150,870

RECORD, CASE NO. 13894.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. ~~275~~. 47

DANIEL MAGONE, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

JAMES E. HELLER AND ADOLPH HIRSH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 28, 1889.

upon the questions of fees and emoluments they can have no application."

The counsel for the appellant also invoke the decision in the McCafferty cases. While the Court of Claims rendered judgment in favor of Patterson, it did not lose sight of its decision in either the Ives or the McCafferty cases, but it could not go in the face of the subsequent decisions of this Court in the Becker, Ewing and McDermott cases that the law of the State, in which the services are rendered, must be looked at to determine what is necessary and for what a Commissioner is entitled to payment.

Following the decisions in those cases, and the principle laid down in the Jones case, that "clerical work, but which are performed by the Commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation," it gave judgment in favor of the appellee, and this judgment, we submit, should be affirmed.

Richd. R. McMahon,
Wm. W. Dudley,
Louis F. McHenry,

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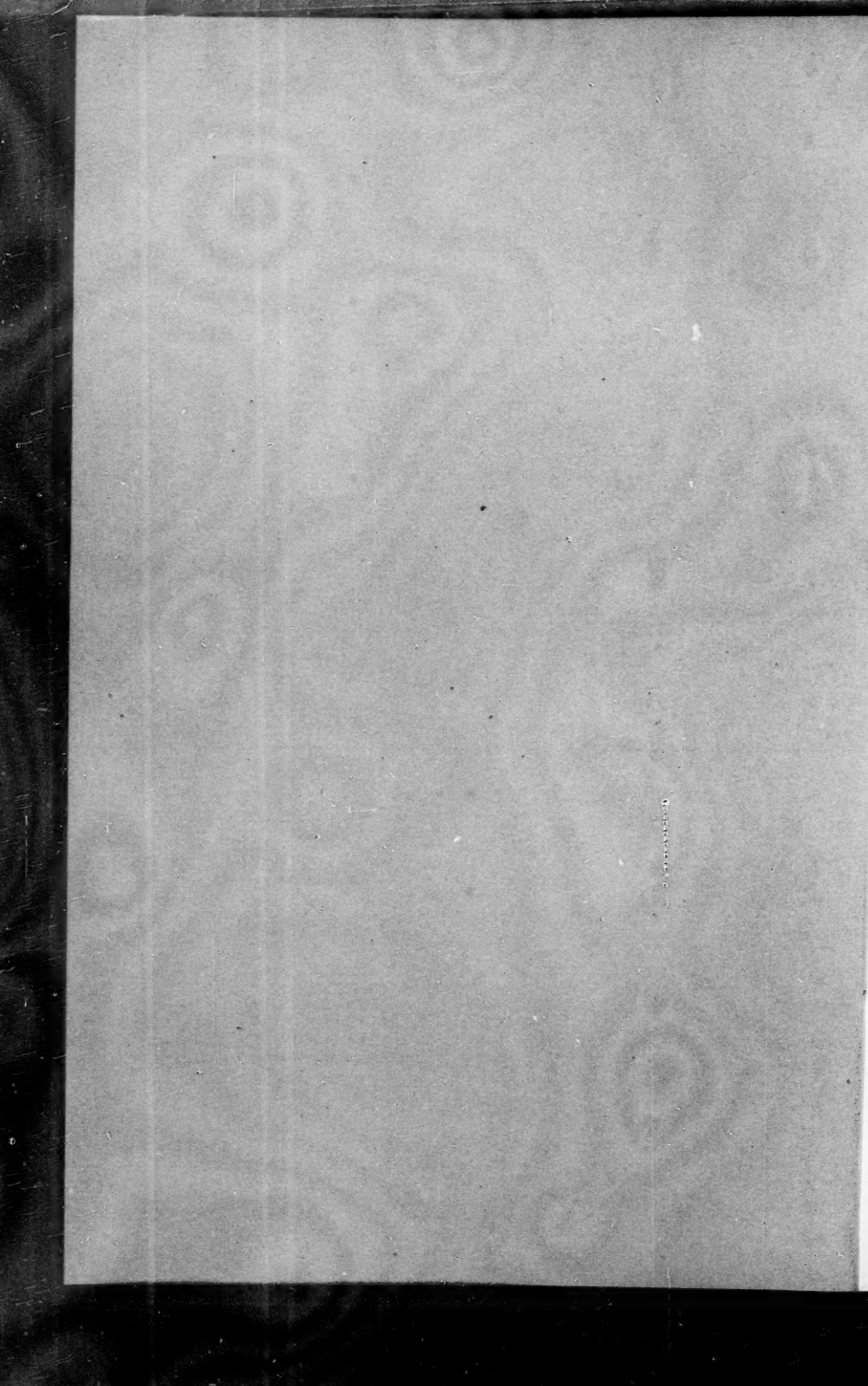

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between James E. Heller, Adolph Hirsh, plaintiffs, and Daniel Magone, defendant, a manifest error hath happened, to the great damage of the said Daniel Magone, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 16th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from 2 to 76 inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Daniel Magone, plaintiff in error, against James E. Heller and Adolph Hirsh, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 26th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsed:) E. & A. A., 881. 12459. U. S. Supreme Court. Daniel Magone, plaintiff in error, against James E. Heller & al., defendants in error. Writ of error. Edward Mitchell, U. S. att'y, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 16 day of October, 1889. Charles Curie, attorney for defendants in error. U. S. circuit court. Filed October 16, 1889. John A. Shields, clerk.

2*a* Superior court of the city of New York.

JAMES E. HELLER, ADOLPH HIRSH, PLAINTIFFS,
against
DANIEL MAGONE, DEFENDANT.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by defendant for the relief demanded in the complaint.

Dated New York, June 1st, 1888.

CHAS. CURIE,
Plaintiffs' Attorney, Office No. 44 Exchange Place, New York City.

2*b* (Endorsed:) No. 12459, N. Y. superior court. James E. Heller & al., plaintiff', against Daniel Magone, defe.dant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange Place, New York City.

3 N. Y. superior court.

JAMES E. HELLER & AL.,
versus
DANIEL MAGONE.
Notice of appearance and demand.

You will please take notice that I am retained by, and appear as attorney for, the defendant in this action, and demand service of a bill of particulars of the plaintiffs' claim herein, and a copy of the complaint and all papers in this action upon me, at my office in the United States court and post-office building in the city of New York.

Yours,

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

New York, June 15, 1888.

To CHARLES CURIE,
Attorney for Plaintiff.

4 (Indorsed:) 12459. N. Y. superior court. James E. Heller & al. versus Daniel Magone. Notice of appearance. Stephen A. Walker, United States attorney, attorney for defendant. To Chas. Curie, esq., plaintiffs' attorney.

5 *The President of the United States of America, to the judges of the superior court of the city of New York, greeting:*

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Daniel Magone, defendant, by James E. Heller & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly

and openly send to the said circuit court, at the city of New York, on the 26 day of June, 1888, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the United States, the 20 day of June, in the year one thousand eight hundred and eighty-eight.

[L. S.] JOHN A. SHIELDS, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

6 (Indorsed:) 12459. U. S. circuit court. James E. Heller & al. vs. Daniel Magone. Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, June 20, 1888. Stephen A. Walker, U. S. attorney, attorney for defendant. To Charles Curie, esq., plaintiffs' attorney. Rec. June 20, 1888.

7 Circuit court of the United States for the southern district of New York.

JAMES E. HELLER, ADOLPH HIRSH, PLAINTIFFS,
against
DANIEL MAGONE, DEFENDANT. } Complaint.

Plaintiffs' complaint:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were during said times partners in trade, under the firm name of Heller, Hirsh & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant as such collector exacted from plaintiffs, as and for duties thereon, and plaintiffs in order to obtain said goods were compelled to pay, and did pay, the sum of $2,018\frac{60}{100}$ *dollars* in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods, against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted, as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for $2,018\frac{60}{100}$ *dollars*, with interest on the several sums named in the bill of particulars, from the several dates of payment, as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

8 (Indorsed:) 12459. U. S. circuit court. James E. Heller et al., plaintiffs, against Daniel Magone, defendant. Complaint. Chas. Curie, plaintiffs' attorney, 44 Exchange Place, New York City. Due service of a copy hereof admitted this 28th day of June, 1888.

9 Bill of particulars. Name of importer, Heller, Hirsh & Co.

		Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
					1887.	1887.		1887.	1887.	1887.	1888.
177	1	Manure sets	Hamb'g	William Volkens	June 2	July 27	416.00	July 27	Dec. 19	Dec. 19	Apr. 7
	2	"	"	Atlantic	Aug. 17	Oct. 17	1,210.20	Oct. 18	" 19	" 19	" 7
	3	"	"	Polynesia	May 18	June 6	392.40	June 7	1888 Feb. 3	1888. Feb. 3	" 3
							2,018.60				

10 (Indorsed:) U. S. circuit court, southern district of New York. James E. Heller et al. against Daniel Magone. Bill of particulars. New York, June 28, 1888. To Stephen A. Walker, esquire, defendants' attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. Chas. Curie, plaintiffs' attorney, 44 Exchange Place, New York City. Due service hereof admitted this 28th day of June, 1888. , defendants' attorney.

11 Circuit court of the United States for the southern district of New York.

JAMES E. HELLER ET AL.
versus
DANIEL MAGONE, COLLECTOR, ETC. } N. S. 12459.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty on the goods referred to in the complaint, was as stated in the complaint; and he denies that the plaintiffs were compelled to pay or did pay defendant as collector or otherwise the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise, or that the same was paid in order to obtain possession of said goods.

II. He denies that the plaintiffs filed with defendant any protest or protests as required by section 3011 of the Revised Statutes of the United States.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

V. And further answering he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon.

VI. And further answering he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon.

VII. And further answering he alleges that this action was not brought within ninety days after the decision by the Secretary of the Treasury on the appeal taken from the ascertainment and liquidation of duties thereon; or within ninety days after payment of duties paid thereon after such decision.

VIII. And further answering, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had, and without ninety days having elapsed from the date of such appeal.

IX. And further answering defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were demanded of plaintiffs and were by plaintiffs voluntary paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

X. And further answering defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made, were sums due from plaintiffs to the United

States as duties, according to the rate of duty imposed by law, upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER,
United States Attorney, Attorney for the Defendant.

12 (Indorsed:) 12459. U. S. circuit court, southern district of New York. J. E. Heller et al. vs. Daniel Magone, collector, etc. Copy answer. Stephen A. Walker, United States attorney, attorney for defendant. Sir: Please to take notice that the within is a copy of an answer this day filed in the office of the clerk of the circuit court of the United States for the southern district of New York. Dated, New York, December 14th, 1888. Yours, &c., Stephen A. Walker, U. S. att'y & att'y for deft. To Charles Curie, esq., attorney for plaintiffs. Recd. Dec. 14, 1888.

13 U. S. circuit court, southern district of New York.

JAMES E. HELLER AND ADOLPH HIRSH
vs.
DANIEL MAGONE. } No. 12459.

It is hereby consented by and in behalf of the attorneys for the respective parties hereto that the judgment herein be entered nunc pro tunc as of the 12th day of October, 1889.

Dated New York, October 16th, 1889.

CHARLES CURRIE,
Attorney for Plaintiffs.
EDWARD MITCHELL,
U. S. Attorney, Atty. for Defendant.

Ordered accordingly.

N. Y., Oct. 16, 1889.

E. HENRY LACOMBE.

(Indorsed:) U. S. circuit court. Filed Oct. 16, 1889. John A. Shields, clerk.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Wednesday, the 22nd day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: the Honorable E. Henry Lacombe, circuit judge.

JAMES E. HELLER ET AL.
vs.
DANIEL MAGONE. } N. S. 12459.

Now come the plaintiffs, by Stephen G. Clarke, esq., their attorney, and move the trial of this cause.

Likewise comes the defendant, by Thomas Greenwood, esq., assistant United States attorney, his attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence of the respective parties, the argument of counsel, and the instructions of the court, the jury, on the 23rd inst., by direction of the court, say that they find a verdict for the plaintiffs in the sum of twenty-two hundred and twenty-five dollars and eighty-four cents ($2,225.\frac{84}{100}$), and so they say all.

On motion of Thomas Greenwood, esq., assistant United States attorney,

15 Ordered, That the defendant have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

On like motion, ordered, that a certificate of probable cause be granted.

An extract from the minutes.

JOHN A. SHIELDS, *Clerk.*

16 U. S. circuit court, southern district of New York.

JAMES E. HELLER AND ADOLPH HIRSH } Judgment No. 12459.
vs.
DANIEL MAGONE. }

The issues in the above entitled action having been brought on for trial on the 22nd day of May, in the year one thousand eight hundred and eighty-nine, before the Honorable E. Henry Lacombe and a jury duly empaneled to try the same;

And the jury having thereafter rendered a verdict in favor of the plaintiffs against the defendant in the sum of two thousand two hundred and twenty-five dollars and eighty-four cents ($2,225.84);

And the costs having been thereafter duly adjusted in the sum of forty-six dollars and eighty-five cents ($46.85);

Now, on motion of Charles Curie, esq., attorney for the plaintiffs,

It is adjudged that the plaintiffs, James E. Heller and Adolph Hirsh recover of and have judgment against the defendant, Daniel Magone, in the sum of two thousand two hundred and twenty-five dollars and eighty-four cents damages, fifty-three dollars and forty-two cents interest,

17 and forty-six dollars and eighty-five cents costs, making in all the sum of two thousand three hundred and twenty-six dollars and eleven cents ($2,326.11), and have execution therefor.

Dated New York, October 16th, 1889, nunc pro tunc, as of October 12th, 1889.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) No. 12459. U. S. circuit court, southern district of New York. James E. Heller et al., vs. Daniel Magone. Judgment roll. Charles Curie, plaintiff's attorney, 44 Exchange Place, N. Y. U. S. circuit court. Filed Oct. 16, 1889, nunc pro tunc, as of Oct. 12th, 1889. John A. Shields, clerk.

18 U. S. circuit court, southern district of New York.

JAMES E. HELLER AND ADOLPH HIRST
vs.
DANIEL MAGONE. } N. S. 12459.

Defendant's bill of exceptions.

Afterwards, to wit, on the 22d and 23d days of May, 1889, at a stated term of this court begun and holden on the first Monday of April, 1889, before the Hon. E. Henry Lacombe, circuit judge, the aforesaid issue so joined as between the said parties as aforesaid as by the record more fully appears came on to be tried by a jury duly impanelled and sworn for that purpose, the said plaintiffs being represented by Stephen G. Clarke, esq., and Charles Curie, esq., and the said defendant by Stephen A. Walker, esq., U. S. attorney, and Thomas Greenwood, esq., asst. U. S. attorney.

And in the course of the trial the said counsel for the defendant did take and allege sundry exceptions to the rulings, instructions, charges, and directions of the court, and to its refusal to give certain instructions and directions to the jury as then and there prayed for by them, which exceptions are hereinafter severally set forth.

To sustain the issues on their part the plaintiffs introduced tes-
19 timony tending to show that on July 27, 1887, by the ship William Volkens, on October 17, 1887, by the ship Atlantic, and on June 6, 1887, by the steamer Polynessia, under the firm name of Heller, Hirsh & Co., they made three importations of merchandise from Hamburg, Germany, into the port of New York.

That the invoice of the importation on July 27, 1887, by the William Volkens put in evidence by them and marked Exhibit I. I. was as to the essential parts as follows:

V. H. 500 bags manure salt.
br. 50,250 kl. tare, 250 kl.
net 50,000 kl.

Analysis 949% a M 8,500 p. 50 kls. of 90%.
incl. bags fro. Stassfurt M 8,962.75.
less cash discount 1% M 8,960.
" commission 1½% M 134.45—25 4.05.

M. 8,738.70

That the invoice of the importation on October 17, 1887, by the ship Atlantic put in evidence by them and marked Exhibit 2 I. was as to the essential part as follows:

V. J. 500 bags manure salt.
br. 50,250 kls. tare 250 kl.
Nt. 50,000 kl.
Analysis 93% p. 50 kl. of 90% a M 8,400.
f. o. b. Stassfurt, M 8,680.

20	Less cash discount ½ % M. ..	130.20		
	" commissions 1 % " ...	86.80		
	" 500 bags a 400 " " ...	200.		
			417	
				M. 8,263
	V. K. 500 bags manure salt.			
	br. 5,250 kl., tare 250 kl., Nt.....		50,000 kl.	
	Analysis 95 % p. 50 kls. of 90 %			
	a M. 8,500 f. o. b. Stassfurt, M..		9,019.45	
	Less cash discount ½ % M..... ..	135.30		
	" commission 1 %	90.20		
	" 500 bags a 400.....	200.		
			425.50	
				M. 8,593.95
	V. L. 500 bags manure salt.			
	f. o. b. Stassfurt.....		8,991.05	
	br. 50,250 kl., tare 250 kl., Nt.....		50,000 kl.	
	Analysis 95.2 %, per 50 kls. of			
	90 % a M. 8,500			
	Less cash discount 1½ % M.....	134.90		
	" commissions 1 % "	89.90		
	" 500 bags a 40.....	200.		
			424.80	
				8,566.25

That the invoice of the importation on June 6, 1887, by the steamer Polynessia put in evidence by them and marked Exhibit 34 was, as to the essential part, as follows:

21	V. G.	500 bags Manure salt, br	50,300 kl.	
		Tare.....	300	
		Net.....	50,000 kl.	
		Analysis: 90.6 % a M. 8.40 p. 50 kls. of 90 % =		M. 8,456.05
		Less commissions, 1 % =	84.53	
		" cash discount, 1½ % =	126.85	
				211.40
				M. 8,244.65

That the defendant as collector of customs at said port classified these importations for duty as "sulphate of potash" under the provision for "sulphate of potash" contained in Schedule A of the tariff act of March 3, 1883 (22 U. S. Stat. at Large, 488), and exacted of the plaintiffs duty thereon at the rate of 20% per centum ad valorem, which amount was paid by the plaintiffs to defendant as said collector.

That against this classification and exaction the plaintiffs made due and timely protests alike in language and claim, the substantial part of which is as follows:

"Claiming that said article is made and imported expressly for use as manure, and is expressly so used, and is entitled, therefore, to free entry

under the provision for "all substances expressly used for manure" in the free list, act M'ch 3, '83.

Second. We separately protest against your assessment of 20% ad val. on said article as "sulphate of potash," claiming that while said article may probably contain sulphate of potash to a greater extent than any other of its component element, that it is nevertheless in fact and commercially a different article, being a compound containing other
22 ingredients besides sulphate of potash and commercially known as "manure salt" and expressly used for manure, and therefore entitled to free entry by the provision of the free list act, M'ch 3, '83, T. I. 505, and not 20% ad val., or 25%, or as charged by you.

* * * * * * *

That thereafter as prescribed by law the plaintiffs in due time appealed and brought suit to recover the duty exacted as aforesaid.

JAMES E. HELLER, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that he was one of the plaintiffs in this action; that he had examined the three invoices in suit and knew the goods covered by them; that it was under his supervision that the samples thereof he had with him in five bottles were drawn; that one was a sample of the importation by the ship William Volkens; one, a sample of the importation by the steamer Polynesia, and three others samples of the three different lots of the importation by the ship Atlantic.

The plaintiffs then put in evidence these samples and the five bottles containing the same were marked S–1.

Upon these bottles were labels which had endorsed thereon the following words, abbreviations, and figures:

23 "Sample V. H.: 500 bags manure salt; test, 94.9 %; ship Volkens; imported 7, 27, '87."

"Sample V. J.: 500 bags manure salt; test, 93 %; S. S. Atlantic; imported 10, 26, '87."

"Sample V. K.: 500 bags manure salt; test, 95.05 %; ship Atlantic; imported 10, 15, 87."

"Sample V. L.: 500 bags manure salt; test, 95.2 %; ship Atlantic; imported 10, 25, '87."

"Sample V. G.: 500 bags manure salt; test, 90.6 %; S. S. Polynesia; imported 7, 13, '87."

24 The witness Heller further testified that the article in suit was manure salt, and that the particular importations thereof in suit came from Germany and were obtained from the mines of that part of Germany that is known as the province of Saxony; that he had often been abroad and seen this article mined, and had seen it in the shape in which it was imported to this country; that the substance as taken from the mine was known as "kainit;" that "kainit" was mined from the mines and then brought to the surface and crushed; that after the crushing it was subjected to washing or leaching; that this washing and leaching was continued until all of the common salt contained in it is washed out; that then the residue from it was sulphate of magnesium and sulphate of potash; that the constituents of the "kainit" originally were common salt, sulphate of magnesium, chloride of magnesium, and sulphate of potash; that those parts of the "kainit" which were of no use for fertilizing purposes were extracted by washing; that the balance, sulphate

of potash, left after the sulphate of magnesium and the chloride of magnesium and the salt were washed out, was burned in a kiln to a dry crisp, and then ground in a mill, and came over here in that condition; that by burning it in a kiln he meant that the water was evaporated from it; that it was not subjected to a calcining heat; that it was dried in the kiln so that the water was extracted from it; that he was able to state to whom his firm sold the importation by the steamer Polynesia; that his firm put that importation into the National Storage Company, and then sold and delivered it to the Williams & Clark Fertilizing Company; that his firm sold one part of the importation by the William Volkens to M. L. Schumacher & Co., fertilizer manufacturers, of Philadelphia; another part to Rogers, Hubbard & Company, manufacturers of fertilizers in a small town in Connecticut whose name he had forgotten, and the rest to the Globe Fertilizer Company, of Louisville, Kentucky; that his firm sold the whole of the importation by the Atlantic to the Mapes Formula and Peruvian Guano Company, manufacturers of fertilizers; that the contract to sell to the last named company was dated, he thought, October 21, 1887, and the contract to sell to the Williams & Clark Fertilizer Company was dated February 3, 1888; that all the companies to which the importations in suit were sold were without exception manufacturers of fertilizers; that his firm had imported manure salt similar to the sample in the five bottles S–1 since about 1882; that so far as his knowledge went such articles were used expressly for fertilizers and manures; that his firm sold them to fertilizer manufacturers expressly.

The witness Heller on cross-examination testified that the importations in suit were produced from an article originally mined in a province of Germany called the province of Saxony; that there were seven different mines in that province which produced, with the exception of one, the same article; that he could not say positively whether the importations in suit were from the city of Staassfurt, but that they were from either of those mines, in the neighborhood of Staassfurt.

This witness, having had his attention called to Exhibit 1 I, and having been asked to read the line thereof commencing with the word "analysis," testified that that line read, "Analysis: 94.9 at 8, marked 5 per 50 kilos, basis 90 %;" that he could not say positively that this 94.9 meant what he thought it meant; that Ex. 1 I was an invoice from Heller, Hirsh & Company, his firm's house in Hamburg.

Q. Do you want the jury to understand that you don't understand what that invoice from your own house means?

A. I think I know, but I could not swear that it is positively so, because I have not made it out; I was not there; I don't know.

Q. Does that guide you in selling the article as to the price that you charge for it?

A. To some extent.

Q. To what extent?

A. To the extent that we sell it; all of it on a basis of ninety per cent.

Q. Ninety per cent of what?

A. Of sulphate of potash, or forty four per cent of pure potash in the shape of sulphate.

Q. And that invoice guided you in making the sale of which you have spoken, so that you charged the price on the supposition that that shows how much sulphate of potash it contains?

A. That it showed over ninety per cent of sulphate of potash and forty per cent of pure potash.

Q. And the analysis in that invoice shows 95 % ?

A. The analysis shows 94.9. We sell those goods on foreign analysis.

27 This witness, on having his attention called to Exhibit 2 I, testified that the analysis under the first item of 500 bags mentioned on that invoice guided his firm in making the price for the article contained in those bags, and that they sold it on the supposition that it contained 90 % of sulphate of potash; that the analysis on that invoice shows ninety per cent; that the analysis under the second item of 500 bags mentioned on that invoice spoke of 95.5; that the analysis under the third item of 500 bags mentioned in that invoice read 95.2; and he guaranteed it as containing 90 % of sulphate of potash on foreign analysis; that if that analysis was wrong his firm was not responsible; that his impression was that his firm sold it—he would not swear to that positively, but that he thought his firm sold it—on a guarantee of ninety per cent; that in some cases he thought that if it run over his firm charged more, and, if less, his firm charged less; that it might be of late that that was the general rule of his firm; that that was not formerly, he guessed, as near as he could remember, to swear to it; that he knew the paper called the "Oil, Paint, and Drug Reporter;" that he did not think he ever had much time to look at the report in that paper for the chemical market; that he did not remember as he had looked at that portion of that report headed "Ammonias, Potashes, and Fertilizing Chemicals;" that he thought he had seen under that heading an article called "muriate of potash."

The witness Heller was then asked the following question:

28 Q. What is that?

(To this question the plaintiffs' counsel objected on the ground that it was irrelevant.)

The COURT. The object of this testimony is to show that certain articles enumerated in the free list eo nomine are used in the manufacture of fertilizers. I think I will exclude the question.

(To this ruling of the court the defendants' counsel excepted, which exception was duly noted and allowed.)

The witness Heller further testified that he had seen under that heading an article styled there "double manure salts;" that he could not remember at that moment whether he ever saw that article quoted there with a basis of ninety per cent of sulphate of potash; he had not looked at those prices in five years; that his firm dealt in mineral salts; that it did not deal in sulphate of potash.

The witness Heller, on being shown a card and asked if he knew whose card that was, testified that that was the card of his firm, and that he found something advertised on it as sulphate of potash; that his firm did not deal in it.

This card, at the request of the defendant's counsel, was marked "A, for identification."

The witness Heller was then asked the following question and gave the following answer thereto:

Q. Then you advertise for sale an article that you do not deal in?

A. I beg pardon; I did not say an article we did not deal in.

29 Q. I thought you said you did not deal in it?
A. Not in sulphate of potash.

Q. You are quite sure you do not deal in an article called sulphate of potash?

A. I am.

The witness Heller was then shown a paper bag, and at the request of the defendant's counsel, having taken out a handful of its contents, testified that he knew where it came from; that he recognized the paper bag, having come from his house; that he recognized the stamp thereon of "Heller, Hirsh & Co., 164 Front street," as their stamp; that he did not recognize the figures and writing above the stamp, "97.40 % sulphate of potash;" that he did not know who wrote it; that if defendants' counsel should tell him that that bag and contents, with that stamp and figures and writing thereon, came from witnesses' office he, witness, would believe defendants' counsel.

Q. When sulphate of potash was asked for?

A. When sulphate of potash was asked for?

Q. Yes, sir.

A. Still, I would not admit it.

This bag with its contents, at the request of defendants' counsel, was then marked "B, for identification."

The witness Heller was also shown a second paper bag and its contents, and on being asked by defendants' counsel if he recognized the contents as an article his firm dealt in, testified that it looked like an article they dealt in; that he did not recognize anything about the paper bag as indicating that it came from their office, except by the paper; that might show him; that there was a mark or their stamp on it, viz, "Heller,
30 Hirsh & Co., 164 Front street;" that the figures and writing thereon, viz, "48.50 % sulphate of potash," was not a correct designation of the contents of that paper bag, and of the basis of the contents; that he did not recognize these figures and this writing, but that he could explain them if he was asked.

This paper bag and contents was then, at the request of defendant's counsel, marked "C, for identification." The witness Heller further testified that the article of the same kind as the contents of this paper bag was "kainit" in concentrated form; that his firm did not sell it as "kainit," but as manure salts.

The witness Heller, on having his attention again called to the card heretofore marked "A for identification" and asked if he found anything advertised therein for sale as "manure salt," testified that he did not see anything thereon that said "manure salt;" that the card winds up, "and all other fertilizing materials," but that he thought one would find that the cards of his firm contained it (manure salt); that the card marked "A for identification" might be ten years old; that the articles enumerated on the last-mentioned card were exclusively sold to manufacturers of fertilizers; that he did not say that these articles were directly applied to the ground for crops; that they were so applied; but that they were generally used in other ways.

HORACE M. OLMSTEAD, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that he was connected with the firm of

31 E. Merck, of 73 William street, in the city of New York, wholesale chemists and dealers to some extent in drugs, but principally in chemicals; that for a little over thirteen years he had been personally acquainted with drugs and chemicals through trading in them; that he knew an article bought and sold in the markets of this country bearing the name of "sulphate of potash;" that he had samples of that article in bottles with him; that the article of which there was a sample in the first bottle produced by him was chemically known as the "crystallized sulphate of potash;" and in commerce known as "sulphate of potash;" that the article of which there was a sample in the second bottle produced by him was the same article, chemically pure.

The plaintiffs then put in evidence these two bottles, and the first was marked S–2 and the second S–3.

The witness Olmstead further testified that the article in the bottle marked S–2 was usually sold in a pulverized form; that his firm always imported it in the crystallized form; that he was not acquainted with the articles in the five bottles marked S–1 (samples of the importations in suit); that he did not recognize them as "sulphate of potash;" that they were none of them white enough.

The witness Olmstead testified on cross-examination that he did not know anything about the articles in the five bottles marked S–1; that he had never met with it before; that the article in the bottle marked S–2 was crystallized; that he recognized that sulphate of potash came in other forms than crystallized; that his firm imported the article contained in the bottle marked S–2, but that he could not tell whether they did in March, 1883, or not.

32 WILLIAM J. GESELLE, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that he was and since September, 1882, had been connected with the house of Lehn & Finck; that they were wholesale dealers in drugs and chemicals; that during all the time he had been with them he had handled "sulphate of potash."

The witness being asked to examine the articles in the various bottles in evidence (S–1, S–2, and S–3) and to say, if he found any that he recognized as the article that had been known as sulphate of potash in September, 1882, and since testified that the article in S–2 was the chemical sulphate of potash; that the article in S–3 was the chemically pure sulphate of potash; that he had brought some samples with him, which he produced; that one was powdered "sulphate of potash" and the other was the same as the article in S–2; that the powdered was sold oftener than the article in S–2, but that it was the same as the article in S–2 when powdered.

(The article called by the witness "powdered sulphate of potash" was then put in evidence by the plaintiff's counsel and marked S–4.)

The witness Gesell on cross-examination testified that he was in the drug and chemical business; that they dealt in all kinds of chemicals; that they did not deal in kainit or kiesent or mineral phosphates for fertilizers or acid phosphates or sulphate of ammonia for fertilizers or nitrate of soda for fertilizers or muriate of potash for fertilizers or azotine; that the drugs and chemicals they dealt in were medicinal drugs and chemicals; that they did not deal in the articles in the five bottles marked S–1; that

the article in the bottle marked S–2 was crystallized sulphate of
33 potash; that he (witness) could not recognize sulphate of potash in the powdered form; that if he was shown a white powder he could certainly not say whether it sulphate of potash or something else; that he recognized that sulphate of potash was sold and existed in different forms than in the crystallized form; that he would not swear that the articles in the five bottles marked S–1 were not sulphate of potash; that his house did not deal in fertilizing materials, and he did not know of any drug house that dealt in fertilizers.

ALBERT U. ANDRUS, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that his business was and for about twenty-five years had been that of wholesale drugs; that his house was that of Lazell, Dalley & Co., of 94 Maiden Lane, in the city of New York; that he knew an article known as sulphate of potash.

The witness Andrus on being asked if he saw among the samples in the bottles marked S–1, S–2, S–3, S–4 any article that he had bought and sold, that he recognized as the articles that were bought and sold in this market as sulphate of potash, testified that his house used the article S–4; that it was generally sold powdered; that he should think the article S–4 looked like it; that he did not know of articles of the character of those in the five bottles marked S–1.

The witness on cross-examination testified that the articles his house dealt in were drugs and chemicals used for medicines; that he could not say how much of the article called by him crystallized sulphate of potash he knew in his experience had been imported; that he could not say whether very little of it had been imported or not, because his
34 house bought it of houses in the city; that it was not to his knowledge used for anything outside of laboratories to any extent, and that it was used then in moderate quantities; that the articles in the bottles marked S–2 and S–3 looked to be identical; that he should say that both these articles would be called in trade and commerce crystallized sulphate of potash.

Q. When you say crystallized sulphate of potash you recognized also that there are other forms of sulphate of potash besides crystals?

A. Yes, sir; in the powder.

Q. And others besides the powdered or the crystallized?

A. We do not know them in our trade.

Q. That is, for medicinal purposes?

A. No, sir.

Q. Or for laboratory purposes?

A. No, sir.

The witness Andrus further testified on cross-examination that he never saw on March 3, 1883, or prior thereto, anything of the kind of the articles in the five bottles marked S–1; that knowing nothing about a sulphate of potash looking like those articles, he could not say whether they were not known to the trade that dealt in them in this country as sulphate of potash; that his house did not deal in them; that his house dealt in fertilizers or fertilizing materials occasionally, only to fill orders mostly other salts than the articles in the five bottles marked S–1; that he never came in contact with the article in the five bottles marked S–1; that

he would not be willing to swear that those articles were not known commercially as sulphate of potash or that they contained 90 to 95 % sulphate of potash.

35 CORD MEYERS, being duly sworn and examined as a witness on behalf of the plaintiffs, testified that he was, and for seventeen years had been, a manufacturer of fertilizers and a dealer in agricultural chemicals, and had a place of business at Maspeth, Long Island; that for three or four years he had known the articles in the five bottles marked S–1, or similar articles; that they were used to furnish a foundation for fertilizers; that they were put into complete fertilizers; that they had also been sold directly to farmers in the condition in which they were in those bottles marked S–1 for fertilizing purposes; that he did not know of any other use for them.

The witness Meyer on cross-examination testified that he bought the article of the kind of those in the five bottles marked S–1 in hundred ton lots or fifty ton lots, under the name of "sulphate of potash;" that he supposed farmers applied directly to the land, generally, this "sulphate of potash" which they bought; that he sold it to them to apply directly to the land; that it was according to how one put it on whether it would burn up almost every kind of crops; that if mixed with a little soil it would not; that he did not know what the farmer did; that all he knew was that he sold it to them; that he did not know how they put it on the land; that he had never seen it put on.

The witness Meyer on redirect examination testified that he called it sulphate of potash to distinguish it from muriate of potash and other potash, such as kainit and double manure salt; that he did not think he ever bought it under the name of manure salt; only as sulphate of potash for fertilizing purposes.

36 EDWARD V. Z. LANE, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that he resided at East Orange, New Jersey; that he was, and for over twelve years had been, with the Mapes Formula and Peruvian Guano Company, fertilizers, 158 Front street, New York City; that they had a factory at Newark, New Jersey, and manufactured fertilizers and dealt in fertilizing materials; that the article in the five bottles marked S–1 looked like an article that they bought; that they had bought articles similar to that from Heller, Hirsh & Co., the plaintiffs in this action; that he did not remember their buying 1,500 bags coming by the ship Atlantic, in October, 1887; that he did not remember any specific lot; that his company had used some of the articles that they had purchased from Heller, Hirsh & Co., and articles similar to those, the greater part of them in manufacturing fertilizers, and had sold some of them.

The witness Lane, on being shown a paper by plaintiffs' counsel, testified that it was a contract for a lot of the article that they bought; that he had no doubt that this lot was delivered to them and the contract fulfilled; that this lot was disposed of the same way that he had testified, for the manufacture of fertilizers, mainly.

The witness Lane being asked, "Do you remember whether you did or did not sell any of that lot?" answered, "I don't recall what disposition was made of that particular lot—that is, as distinguished from any other particular lot."

The plaintiffs' counsel then put in evidence the above-mentioned paper, and the same was marked "Exhibit 5."

37 The following is a copy of "Exhibit 5":

"NEW YORK, *Oct.* 21*st*, 1887.

"Sold to Mapes Formula & Peruvian Guano Co., city, about one hundred and fifty (150) tons of high-grade manure salts, guaranteed to contain maximum one per cent (1%) chlorine, at two dollars and twenty cents ($2.20) per 100 lbs., basis of 90% sulphate of potash, foreign analysis; foreign invoice weights; weights guaranteed; ex ship "Atlantic," now discharging in New York. Goods to be removed as soon as vessel is ready to discharge.

"Terms, cash.

"HELLER, HIRSH & CO.

"Heller, Hirsh & Co., commission merchants and brokers in chemicals and fertilizer materials, 164 Front street, New York. Accepted.

"Goods to be 90% sulphate of potash or over and bags to be in usual good order and condition. Goods to be finely ground, similar to previous lots received by us.

"THE MAPES F. & P. G. CO.
"By EDW. V. Z. LANE, *Treas.*

"No responsibility, except by special agreement."

38 The witness Lane further testified that the signature to this paper was the signature of his company; that the proportion of these articles purchased by them from Heller, Hirsh & Co., that they had not used themselves for manufacturing fertilizers, but had sold out of their place as purchased, was a very small proportion.

The witness Lane, on cross examination testified that "sulphate of potash" was one of the names by which these articles were known; that he did not know what defendants' counsel meant when he asked him if that was the general name; that his company dealt with Heller, Hirsh & Co.

The witness Lane on having his attention called to the item of "sulphate of potash" on the card marked "A, for identification," testified that he would not be able to tell from that card whether it meant this particular kind that they bought under the paper marked "Exhibit 5," or a lower grade testing 48 to 50 per cent; that he knew that the lower grade testing that much was called "sulphate of potash" and double manure salt; that double manure salt was one of the names, but not always; whether most generally he did not know; that his company called it "sulphate of potash" in all their publications, sold it as "sulphate," and bought it as "sulphate;" that he could not say whether they bought and sold the articles in the five bottles marked S–1 as sulphate of potash, because the paper, Exhibit 5, was made out as high-grade salt; that they bought the lot under that paper knowing perfectly well what it would be; that it was to

contain ninety per cent "sulphate of potash;" that it was essentially sulphate of potash, according to his idea; at the same time it was bought as high-grade manure salt; the two names meant the same thing
39 to them really; that he had looked at the paper called the "Oil, Paint, and Drug Reporter."

Q. What do you understand by double manure salts, basis 48 sulphate of potash; do you understand that to be the same article as that?

A. I don't know what article you mean.

Q. The same as samples S–1.

A. Am I to take the marks on the bottles?

Q. No, sir; from your knowledge.

A. I can not say in the mechanical condition what that is; I merely say what it looks like; it is an article that looks very much like it.

The witness Lane further testified on cross-examination that when he bought sulphate of potash it depended entirely on what the contract said whether they expected the basis to be higher than forty-eight per cent; that they called it all "sulphate of potash," whether the basis was forty-eight or ninety-five per cent, and they called it by other names; that whether the article of forty-eight per cent "sulphate of potash" and the ninety-five per cent basis was generally known as "sulphate of potash" he could only say from his own experience; that he did not know about the trade of others; that they called it in their publications "sulphate of potash," the 45 to 50 and the 90 to 98 per cent; that they did not use articles like those in the bottles marked S–2 and S–3; that neither of them was familiar to him; he did not know them.

40 The witness Lane, on being subsequently recalled by the plaintiff testified that since he was examined he had ascertained that the goods covered by the paper "Exhibit 5" were sent to the factory of his company and were all consumed in the manufacture of fertilizers; that they were mixed or compounded with a variety of materials, i. e., animal matter, to make fertilizers; that they were used as a salt of potash, and the materials mixed with them were animal matter and other chemical salts and various fertilizing materials; that that was not a complete manure which his company made; that there should be ammonia derived from animal matter and nitrogen derived from other sources, as well as potash, combined with other things as well, in order to make complete manure; that he could not say that all fertilizers, as a rule, contained potash, nitrogen, and ammonia; that very many did; that potash was only one element in the complete fertilizer; that his company thought it was an essential element in many fertilizers for many purposes of growing crops.

The witness Lane on cross-examination testified that there were other materials besides sulphate of potash that were used in the manufacture of fertilizers, viz, muriate of potash, sulphate of ammonia, nitrate of soda, dried blood, dried flesh, acid phosphate, bone, bone char when it was dissolved (or what was known as bone char; they called it bone black; it was the refuse from sugar refineries, which, after it had served its purpose in sugar refineries, was used as a fertilizer), ground bone, ground hoofs, sometimes tankage, azotine, kainit, kieserit, mineral phosphates; that as to what others use he only knew by hearsay; that he never heard
41 of starch being used; that his company held themselves out as sellers of manure; what they call manures; they manufactured;

what they called manures or fertilizers; they called them by either name; that according to their interpretation of the terms, manure and fertilizers were the same thing, used for the same purpose, to enrich the land; that they did by no means confine the term "manure" to the excrements of animals.

GEORGE F. TAYLOR, being duly sworn and examined in behalf of the plaintiffs, testified that he was, and for 15 or 16 years had been, a broker in fertilizing materials and chemicals, both buying and selling them; that he had dealt in an article known in the trade as manure salt; that it was bought and sold to manufacture fertilizers principally; that he knew it by another name; that he had heard it called "sulphate of potash," and he supposed that muriate of potash came under that head (manure salt), and that kainit came under that head as well; that to distinguish the particular salt the sulphate or muriate was specified; that the value of these various salts varied according to the amount of potash they contained; that during the time he had dealt in them the only use of them he knew of was in the manufacture of fertilizers, or in applying them directly to the soils

The witness on cross-examination testified that they were generally used in the manufacture of fertilizers.

42 Q. Generally bought and sold under the name of "sulphate of potash?"

A. Manure salt.

Q. The article before you there?

A. No. It is bought and sold under the name of both.

Q. Generally under that of sulphate of potash?

A. It might be 48 to 50, or the higher grade for all I know.

The witness Taylor further testified that the article which was in one of the five bottles S–1, and marked ninety-five per cent sulphate of potash, he should designate as "sulphate of potash" to distinguish it from the lower grades; that that was what he understood those that dealt in it—generally, not always—designated it; that he did not deal in the articles marked S–2 and S–3, and to his knowledge did not know of any fertilizer man or broker or manufacturer of fertilizers that did; that kainit was sold on the basis of the "sulphate of potash" it contained; that the potash was in the form of sulphate in kainit, he believed; that muriate of potash was on the basis of muriate of potash, and double manure saltwas sold on the basis of sulphate; that they were all sold on the basis of the sulphate of potash contained in them; that it might not always be the case that they were spoken of so in the trade journals, but it was generally the case, he thought; that he did not think they gave the percentage of sulphate of potash in kainit; it was generally understood by the trade that muriate of potash was not sold on the basis of sulphate of potash it contained, as it was not supposed to contain any sulphate of potash.

43 Q. Is that sold on the basis of anything it contains?

A. Yes, sir.

Q. Generally?

A. Almost always; always, he thought.

EMANUEL S. KUH, being duly sworn and examined in behalf of the plaintiffs, testified that his place of business was at 67 Pearl street, in the

city of New York; that his business was, and for 16 years had been, that of buying and selling fertilizing materials; that he dealt in all that went in making fertilizers, besides others, but generally fertilizers, bone black, &c., acid phosphates, and all the different salts which go into the manufacture, bone meal, phosphate rock, &c., hoofs, bones, dried blood; that he had purchased goods from Heller, Hirsh & Co., the plaintiffs in this action; that he had purchased from them for fertilizing purposes different kinds of salts, kainit, nearly the whole range of what he had spoken of before; that he had bought from them some bone black and kainit, potash salts; that he knew an article known as manure salts; that that article contained sulphate of potash in varying quantities up to 95 %; that he did not know any other use for it and similar articles than that for fertilizing purposes; that they were not, in the condition in which they were handled, fit for any other purpose.

The witness Kuh on cross-examination testified that nearly all of the articles mentioned by him were generally used for manufacturing
44 fertilizers; that from this recollection the fertilizing materials that he bought from Heller, Hirsh & Co. were bone black and bone meal; that he never bought from them albumen or starch or brimstone or kieserit, but he had bought from them hoofs, ground bones, muriate of potash, kainit, rock phosphates; that all the potashes were "sulphate of potash," except muriate of potash; that the sulphate of potash in the five bottles marked S–1 was impure sulphate of potash; they called it double manure salt; he bought it as such; that he had never bought any sulphate of potash from Heller, Hirsh & Co.; it was always called manure salt.

The witness Kuh on having his attention called to the item of "sulphate of potash," mentioned on the card marked "A for identification," testified that he supposed it referred to double manure salt; that manure salt was always billed to him as sulphate of potash; that for the basis of sulphate of potash in the article generally known to the trade by the name of manure salt, they always had to take the foreign analysis; that the basis was supposed to be from 48 up to 50 %; that the basis of what they called the higher grade of manure salt was from 90 or 88 or 82 per cent, 88 to 94 and 95 %; that he had never seen it as high as that; that he would not call that article sulphate of potash; that it might be usually called so; that he was acquainted with the paper called the "Oil, Paint, and Drug Reporter;" that if he saw an article advertised in that paper as "sulphate of potash continued to be quiet at $2.40, with a basis of 90," he would suppose double manure salt was meant—the articles in the five bottles marked S–1.

45 CHARLES M. STILLWELL, being duly sworn and examined in behalf of the plaintiffs, testified that he was an analytical and consulting chemist, and also chemist of the New York Produce Exchange; that he had been in business as a chemist in this city over twenty years; that he had examined the article in the five bottles marked S–1; that it was what was known in commerce as high-grade manure salt or high-grade sulphate of potash; that either term was used; that he did not know himself practically, except from books, how it was obtained, but it was a product of kainit which contained sulphate of potash and sulphate of magnesia; that kainit as taken from the ground con-

tained about 25 or 26 per cent of sulphate of potash and also sulphate of magnesia, common salt, also chloride of magnesia, and other impurities; that kainit was used principally for fertilizing purposes; that the article in the five bottles marked S–1, as far as his knowledge of them went, was calculated to be used for fertilizing purposes alone.

That the substance in kainit that made it most valuable for fertilizing purposes was the sulphate of potash; the other substances in it are of some value, perhaps, as fertilizers; that there was a difference in the action of the muriate of potash and of the sulphate of potash upon plants; for certain crops one is preferred, for others the other; that sulphate of potash is especially desirable for tobacco; he supposed that was the most important crop for which it was desirable; that the muriate of potash affected the burning quality of the tobacco; that the tobacco did not burn as well as when the sulphate of potash was used; that he knew
46 sulphate of potash; that the article in the five bottles marked S–1 was used only for fertilizing purposes; that he knew sulphate of potash, and had used it in chemistry for twenty-five years; that the article that was known in this country as sulphate of potash was entirely different from the article in the five bottles marked S–1.

The witness Stillwell being asked if he would recognize it from looking at it, answered that he could give a guess at it; that would be all. This witness further testified on his direct examination that the sulphate of potash used in medicine and chemistry was a white, *ch*rystallized substance; that in the powder form, of course it was a white powder; that samples S–2 and S–3 looked like it as near as he could tell; that these (samples S–2 and S–3) were crystals; that of course the powder he could not tell anything about; that these crystals (sample S–2 and S–3), if powdered, would look exactly like this powder (sample S–4); that the muriate of potash was used for fertilizing purposes; that the pure form of muriate of potash was used in chemistry and analytical work; that what was known in trade was used solely for fertilizing purposes; that he would qualify the last statement; it was used, besides fertilizers, in making nitrate of potash, for making gun powder, and could be used in making alum, and was, according to the books, but he had never so used it himself.

47 The witness Stillwell on cross-examination testified that he had examined all of the articles in the five bottles marked S–1; that he did not state that they analyzed 25 or 26 per cent potash; that it was kainit that analyzed that percentage; that he did not analyze the articles in the five bottles marked S–1 for the percentage of potash; that the analysis was already upon these five bottles; that he examined them for other substances besides sulphate of potash; that he thought the analysis marked upon one of these five bottles shown him was correct; that he did not know who made it; that this analysis was 94.9 per cent sulphate of potash; that he had never bought or sold the articles in suit; that he had seen contracts and other references to them; that he did not know the predominating name under which they were sold; that they were called sulphate of potash and high grade manure salt; that the term manure salt was applied to perhaps only three articles, kainit, sulphate of potash (so called) or the double sulphate of potash and magnesia, and muriate of potash and kieserit; that the articles in suit, as far as he knew, were generally used in the manufacture of fertilizers; that if they

were applied directly to the root of the plant they would injure it, but not if applied in small quantities like this (illustrating); that they would not if mixed with something else; that they might be sprinkled on the soil lightly; in that case they would not hurt vegetation; that any of these chemicals used in fertilizers would injure vegetation if applied in large quantities; that if they were spread on grass they would not injure
48 it, if not spread on too much; that he had done it himself; that it depended entirely on the quantity used.

That the articles in S–2 and S–3 he should call crystallized sulphate of potash, from the looks of them; that they were not used in making fertilizers; that he never knew of their being so used; that they were used in chemical analysis and for medicinal purposes; that he did know how much they were used for medicinal purposes; that he did not buy or sell them; that he was only familiar with their use in the laboratory.

That he did not know of any other use to which articles in the five bottles marked S–1 were put than what he had already mentioned; that they could be used in the manufacture of alum; that as far as his experience went he had never known them to be so used; that his office was in Kalbfleisch & Co.'s building; that he did not know whether they used articles of the same kind as those in suit for that purpose; that they had never consulted him about them; that they manufactured blue vitriol, a general line of chemicals, some fertilizers, alum; that he did not know whether they used sulphate of potash in the crystallized form for making alum; that he knew they used bauxite in the manufacture of alum.

49 JOSEPH H. GILMORE, being duly sworn and examined as a witness in behalf of the plaintiffs, testified that he was general office manager for Williams & Clark Co., manufacturers of fertilizing; that he recognized the signature to the paper shown him as that of John T. Williams, the president of his company; that his company received the goods mentioned in that paper.

The plaintiffs' counsel then offered in evidence the paper.

To the reception in evidence of this paper the defendants' counsel objected, on the ground that it was irrelevant and immaterial.

This objection the court overruled, and to this ruling the defendants' counsel duly excepted, which exception was duly noted and allowed. This paper was then admitted in evidence and marked Exhibit 6. The following is a copy thereof:

"NEW YORK, *Feb'y 3rd*, 1888.

"Sold to Williams & Clark Co., city, about fifty (50) tons of high-grade manure salt, testing 90.60 % sulph. pot. on foreign analysis, at two dollars and thirty cents ($2.30) per 100 lbs., basis of 90 %, foreign analysis, ex store, New York, foreign invoice weights and tares, full weights guaranteed here. Sellers' representative to tally weights at buyers' works; any deficiency from invoice weights to be made good by sellers. Goods to be removed by Feb'y 29th, '88. Terms, cash; payable March 5th, 1888.

"HELLER, HIRSH & CO.

50 "Heller, Hirsh & Co., commission merchants and brokers in chemicals and fertilizer materials, 164 Front street, New York.

"Accepted Williams & Clark Co., per John T. Williams, Pres.

"No responsibility except by special agreement."

The witness Gilmore further testified that his company used the goods mentioned in this paper for the manufacture of fertilizers.

The witness Gilmore on cross-examination testified that he had been general office manager for his firm for about eight years; that his firm had been using the article of the same kind as that sold under the paper, Exhibit 6, as manure salts, and testing 90.6 sulphate of potash, he thought for four or five years in the manufacture of fertilizers; that the name under which this article was bought and sold in this country on March 3, 1883, and prior thereto was double manure salt, he thought, or high grade double manure salt; that he was no more familiar with this article than with other manure salts; that on and prior to March 3, 1883, he was familiar with this article so far as the term given to it—high grade double manure salt; that he was familiar with an article used in the manufacture of fertilizers and known by the name of sulphate of potash; that he did not know that it differed in any way from the article mentioned in Exhibit 6, only a lower per cent; that nearly all the potash his firm used,

51 except the muriate of potash, contained sulphate of potash; that he could not say that he had not as matter of fact known the articles of the same kind as those in suit under the name of sulphate of potash more than he had under the name of manure salt; that when his firm sold them they called them sulphate of potash, and sometimes they called them double manure salt, and sometimes high grade salt, sulphate of potash, or double manure salt; that the plaintiffs in this action advertised them for sale as high grade manure salt.

The witness Gilmore on being shown the card marked "A, for identification" and asked by defendant's counsel if he found in the list of articles mentioned therein anything that described the article referred to in Exhibit 6, testified that he saw nothing; that he saw nothing in that list that described the article referred to in Exhibit 6.

The witness Gilmore further testified on his cross-examination that he did not know what the sulphate of potash mentioned on the card marked "A, for identification" was, and he did not know to what it referred; that his firm used in the manufacture of fertilizers, of the other articles mentioned on that card, bone black, ground bones, tankage, dried blood, sulphate of ammonia, nitrate of soda, muriate of potash, kainit mineral phosphates, and acid phosphate, and sometimes azotine, which was ground meat scraps, but nothing else; that he had never heard of soot or starch being so used; that he did not know what the article in the bottle marked S–2 or the bottle marked S–3 was; that his duties in his firm were

52 the general charge of all sales that were made, general office duties, charge of all accounts in the office, entering up of all accounts in the office, entering up of all contracts, seeing that they were properly received at the works, checking bills, passing on credit; that he did not personally buy any article like those referred to in Exhibit 6; that once in awhile his firm had calls from some farmer for such articles in the condition in which they received them; that he passed on the orders for sale that were received by his firm; that he came in contact with the pur-

chaser very seldom; that he did come in contact with the seller of articles mentioned in Exhibit 6 no more than anybody in his position would; that he was in the office of his firm paying out checks, delivering messages, &c., but not for the purpose of buying.

The witness Gilmore on direct examination testified that he kept an account of what went to his firm's factory and of what came from it; and that he knew what disposition was made of the articles referred to in Exhibit 6.

It appeared that the amount of duties paid at 20 per centum ad valorem was $2,018.60, and the interest thereon $207.24, making a total of $2,225.84.

The plaintiffs then rested.

The defendant's counsel to sustain the issue on his part called

JOHN N. LEWIS, Jr., who being duly sworn, testified that he was a lawyer, and a clerk in the office of Stephen A. Walker, U. S. attorney for the southern district of New York, and attorney for the defend-
53 ant in this action; that at the request of the defendant's counsel he went to the place of business of Heller, Hirsh & Co., the plaintiffs in this action, for the purpose of obtaining one of their business cards or circulars; that his recollection was that it was between two and four in the afternoon, but he would not be positive of that, either last week or the last part of the week preceding; that he saw some representative of Heller, Hirsh & Co., at their office; that he asked him for one of their circulars, but that he did not receive one; that afterwards he asked him for one of their cards, and received the card hereinbefore referred to marked "A, for identification."

The defendant's counsel then offered in evidence the card marked "A, for identification," and the same was admitted in evidence and marked "Exhibit A." The following is a copy thereof:

"Heller, Hirsh & Co., commission merchants and brokers. Offices: No. 164 Front street, New York.

"Branch offices: 69 Exchange Place, Baltimore, Md.; Brown's Wharf, Charleston, S. C.; 2597 Archer avenue, Chicago, Ill.; 2 N. Groeninger st., Hamburg, Ger.

"Specialties.—Blood albumen, egg albumen, starch, bone black, brimstone, hoofs, ground bones, tankage, dried blood, azotine, sulphate of ammonia, nitrate of soda, sulphate of potash, muriate of potash, kainit, kieserit, mineral phosphates, acid phosphate, and all other fertilizing materials."

54 OLIVER C. SHAW being duly sworn and examined as a witness in behalf of the defendant, testified that he was a clerk in the office of Stephen A. Walker, U. S. attorney, and attorney for the defendant in this action; that at the request of the defendant's counsel on the 21st of May, 1889, he went to the office of Heller, Hirsh & Co.; that he had seen before the bags and contents marked "B, for identification," and "C, for identification;" that they came from Heller, Hirsh & Co.; that when he went to their office he asked for two samples of sulphate of potash, one about 95 per cent, and one about 90, or as near that as he could get; that the person he asked was a very young person, about twenty he should judge; that when he went into their office this person was behind

the desk, behind the railing—he was inside—one of the clerks he should judge; that when he (witness) asked him for sulphate of potash grades 90 and 95, he called on an older person who, witness thought, sat behind the cashier's desk; that the young person then said that 90 % and 95 % were about the same, that they were very low grades; that he would give witness that and also a higher, and he prepared the two bags with contents marked "B, for identification" and "C, for identification," and handed them to witness in the way they were then; that the elder person gave the younger one an order to go and get them, and the younger one prepared them and handed them to witness just as they were then, with the figures, the writing, and the stamp of the firm's name thereon.

The defendant's counsel then offered these two bags with their contents in evidence, and the same were marked Exhibits B and C.

55 The figures, writing, and stamp of the firm name of Exhibits B were as follows:

"97.40 %
Sulphate of potash.
Heller, Hirsh & Co.,
164 Front street."

And on Exhibit C, as follows:

"48/50 %
Sulphate of potash.
Heller, Hirsh & Co.,
164 Front street."

JOHN H. WAINWRIGHT, being duly sworn and examined as a witness in behalf of the defendant, testified that he was, and for the last six years had been, an analytical chemist in the employ of the United States Government at the appraiser's stores in the city of New York; that his duties during this time had been those of a general analyst to the appraiser's department; that prior to this time he was for a short time employed as chemist in the city of New York; previous to that, for a short time, at the steel works in Syracuse, and before that he was studying in the School of Mines in the city of New York under Prof. Chandler; that he had made analysis of the articles in the five bottles marked S-1; that he had made his reports of this analysis in writing, on the heads of which reports he had copied the marks on the labels of these five bottles.

56 The witness Wainwright then produced these reports, and on the offer of the defendant's counsel they were received in evidence and marked Exhibit 7.

The following are copies thereof:

1. "*Chemist's report.*

"APPRAISER'S OFFICE,
"UNITED STATES LABORATORY,
"*New York, April* 16, 1889.

"Laboratory No. .

"Invoice designation of sample: Sample V. H. 500 bags manure salt, test 94.9 %, ship "Volkens." Imported 7/27/87.

"The sample bearing the above marks contain':

Insoluble matter	1.05	per cent.
Potash	51.25	" "
Magnesia	0.88	" "
Sulphuric acid	46.40	" "
Chlorine	0.21	" "
Moisture, undetermined matter, & loss	0.21	" "
	100.00	

"Potash 51.25 per cent, equivalent to sulphate of potash 94.84 per cent.

"J. H. WAINWRIGHT, PH. B.,
"*Chemist.*"

57 2. "*Chemist's report.*

"APPRAISER'S OFFICE,
"UNITED STATES LABORATORY,
"*New York, April* 16, 1889.

"Laboratory No. .

"Invoice designation of sample: Sample V. J. 500 bags manure salt, test 93.0%, S. S. "Atlantic," imported 10/26/87.

"The sample bearing the above marks contains:

Insoluble matter	1.75	per cent.
Potash	50.47	" "
Magnesia	0.84	" "
Sulphuric acid	45.85	" "
Chlorine	0.35	" "
Moisture, undetermined matter, and loss	0.74	" "
	100.00	

"Potash 50.47 per cent, equivalent to sulphate of potash 93.52%.

"J. H. WAINWRIGHT, PH. B., *Chemist.*"

58 3 "*Chemist's report.*

"APPRAISER'S OFFICE,
"UNITED STATES LABORATORY,
"*New York, April* 16, 1889.

"Laboratory No. .

"Invoice designation of sample: Sample V. K. 500 bags manure salt, test 95.05%, ship Atlantic, imported 10/15/87.

"The sample bearing the above marks contain':

Insoluble matter	0.55	per cent.
Potassa	51.52	" "
Magnesia	0.43	" "
Sulphuric acid	47.09	" "
Chlorine	0.28	" "
Moisture, undetermined matter, and loss	0.13	" "
	100.00	

"Potassa 51.52 per cent, equivalent to sulphate of potash, 95.37%.

J. H. WAINWRIGHT, PH. B., *Chemist.*"

59 4. "*Chemist's Report.*

"APPRAISER'S OFFICE,
"UNITED STATES LABORATORY,
"*New York, April* 16, 1889.

"Laboratory No. .

"Invoice designation of sample: Sample V. L. 500 bags manure salt, test 95.2%, ship Atlantic, imported 13/25/87.

The sample bearing the above marks contains:

Insoluble matter	0.45	per cent.
Potassa	51.62	" "
Magnesia	0.43	" "
Sulphuric acid	46.54	" "
Chlorine	0.28	" "
Moisture, undetermined matter, and loss	0.68	" "
	100.00	

"Potassa 51.62 per cent, equivalent to sulphate of potash 95.67%.

"J. H. WAINWRIGHT, PH. B.,
"*Chemist.*"

60 5. "*Chemist's report.*

APPRAISER'S OFFICE,
UNITED STATES LABORATORY,
New York, April 16, 1889.

Laboratory No. .

Invoice designation of sample. Sample V. G. 500 bags manure salt; test 90.6%. S. S. Polynesia. Imported 7/13/87.

The sample bearing the above marks contains:

Insoluble matter	0.40	per cent.
Potassa	49.19	" "
Magnesia	1.15	" "
Sulphuric acid	46.81	" "
Chlorine	0.57	" "
Moisture, undetermined matter & loss	1.78	" "
	100.00	

Potassa 49.19 per cent, equivalent to sulphate of potash 91.05%.

J. H. WAINWRIGHT, Ph. B., *Chemist.*"

61 The witness Wainwright further testified on direct examination that by "potassa 49.19" found in the last-mentioned report (of sample V. G.) he meant the potash which entered into combination with the sulphuric acid, forming a salt or sulphate of potash; that the sulphate of potash in that sample was calculated from the percentage of potassium,

and was found by him to be 91.05 per cent; that the potassa and sulphuric acid he got was from separating or analyzing the sulphate of potash; that he was familiar to some extent with an article like that in S–2 and S–3; that from the label on S–2 and S–3 and from the appearance of the article in them, he would take it to be crystallized sulphate of potash; that he believed that that form of potash was used for medicine; that he knew it was used to some small extent in chemical laboratories; that it was not to his knowledge used to any considerable extent in medicine, that he did not know anything about it; that to the best of his knowledge he believed its use was pretty nearly obsolete in medicine; that the chemical difference between the articles in the five bottles S–1 and the articles in S–2 and S–3 was only in the small amount of muriates contained in the former; that the chemically pure, the crystallized, contained the least impurities; that otherwise the articles in the five bottles S–1 and the article in S–2 and S–3 were two kinds of the same substance—sulphate of potash.

The witness Wainwright, on cross-examination, testified that he was familiar with kainit; that it contained sulphate of potash; that it contained the same sulphate of potash as the articles in the five bottles
62 S–1 which he had analyzed, except in less proportion, but in combination with but a small amount of other things; that the kainit contained the same sulphate of potash as the articles in the five bottles S–1, except in a small proportion; that there was a great deal less proportion in the former than in the latter; that in the former there was about twenty-six or twenty-seven per cent of sulphate of potash; that by his analysis of the articles in the five bottles S–1 he found the proportion of actual potash that was in them and of sulphuric acid, and then by calculation he arrived at the percentage of sulphate of potash; that that was the way the sulphate of potash was always determined; that 91.05 per cent given in his last-mentioned report (of sample V. G.) showed the percentage of the bulk of the article that was sulphate of potash, if the weight was considered the bulk—it was the percentage by weight, that is, it was the percentage of the chemical constituents by weight.

The witness Wainwright, on redirect examination, testified that his determination of the percentage of sulphate of potash in the articles in the five bottles S–1 agreed substantially with the percentage marked on the labels on these bottles—within the neighborhood of a half of one per cent, or something of that kind.

HENRY J. BRAKER, being duly sworn and examined as a witness in behalf of the defendant, testified that his business was, and for over
63 fourteen years had been, that of drugs, chemicals, and fertilizers; that he was in the firm of H. J. Baker & Bro., of 215 Pearl street, in the city of New York; that his firm had representatives all over the country in the fertilizing line; that he had dealt in articles like those in the five bottles S–1.

Q. Do you know under what names those articles (S–1) were bought and sold on March 3, 1883, and prior thereto?

By PLAINTIFFS' COUNSEL:

Q. How long have you been in the business?

A. Over fourteen years. They have been sold both as manure salt and salts of potash.

By DEFENDANT'S COUNSEL:

Q. Generally, by what name at that time?

(To this question the plaintiffs' counsel objected, as calling for the conclusion of the witness.)

The COURT. I sustain the objection, and I sustain it upon the ground which I shall herafter apply to all other questions asked, to wit, that it makes no difference what it was known as in trade or commerce, or what it really was; that the only question to be determined here is whether it was expressly used as manure. Therefore testimony as to trade meaning is immaterial.

DEFENDANT'S COUNSEL. I would like to modify my question a little.

Q. Generally, by what name at that time was it bought and sold by importers and wholesale dealers in this country?

(To this question the plaintiffs' counsel made the same objection as just stated.

64 The court sustained this objection, and to this ruling the defendant's counsel duly excepted, which exception was duly noted and allowed.)

Q. Do you know when the term "manure salt" was first used in trade?

(To this question the plaintiffs' counsel made the same objection as just stated.

This objection the court sustained, and to this ruling the defendant's counsel duly excepted, which exception was duly noted and allowed.)

The witness Barker further testified that articles of the same kind as those in the five bottles S–1 were used for fertilizing purposes and for making alum and other chemicals, and the bichromate of potash, he thought.

The witness Barker, on cross-examination, testified that he did know how the particular importations in suit were used.

HAMILTON H. SALMON, being duly sworn and examined as a witness on behalf of the defendant, testified that his business was and for about fifteen years had been that of importing fertilizing chemicals; that his firm was Hamilton H. Salmon & Co., of 136 Pearl street in the city of New York; that during that time he had bought an article like the articles in the five bottles S–1, and he knew what it was.

65 The witness Salmon, in answer to questions propounded to him by the plaintiffs' counsel, testified: That he had dealt in manure salts, sulphate of potash, muriate of potash, bone black, and various articles; that by the term "manure salt" he understood an article that was exclusively used for manuring purposes; that all of it was used for that purpose; that he had imported it and was the first one that imported it into this country; that he understood that it was exclusively 48 to 50 per cent goods.

That he had not imported an article containing a greater percentage of potash than 55 per cent; but that he had dealt in it; that he had bought it in this country; made one purchase in 1885; that that was the only purchase of it that he had made.

The witness Salmon, in answer to a question propounded to him by the court, testified that he was familiar with the article containing more than

55 per cent of potash, but had had no dealings in it except the one purchase he had mentioned.

The witness Solmon further testified, on direct examination, that as a dealer in fertilizers, and as a man who met dealers in fertilizing materials, he was perfectly familiar with S-1.

Q. Will you state what that article S-1 is?

(To this question plaintiffs' counsel objected. This objection the court sustained, and to this ruling the defendant's counsel duly excepted, which exception was duly noted and allowed.)

66 Q. Will you state by what name that article S–1 was generally bought and sold in this country by importers and wholesale dealers therein on March 3, 1883, and prior thereto?

(To this question the plaintiffs' counsel objected. This objection the court sustained, and to this ruling the defendant's counsel duly excepted, which exception was duly noted and allowed.)

The witness Salmon further testified, on direct examination, that articles of the same kind as those in the five bottles S–1 were used for the manufacture of potash; that they were also used for the manufacture of alum; that they were used also for what they called refined potash—he forgot the technical term of it—and, he believed, for several other processes that it goes through; that the bic'romate of potash was, he believed, also one of the ingredients that was made from them as a component part.

The witness Salmon, on being shown the card, Exhibit A, and asked whether, during his connection with fertilizer manufacturers and dealers in fertilizing materials, he had become acquainted with any of the articles mentioned on the bottom of that card, testified that he knew pretty much all of them; that he knew their component parts; that he was acquainted with nitrate of potash, muriate of potash, sulphate of ammonia, kainit, kieserit, acid phosphate, and mineral phosphate; that he had dealt in all of them.

67 The witness Salmon, on cross-examination, testified that muriate of potash was used for various purposes—for the manufacture of fertilizers, and for many other chemical purposes; that he had never seen bichromate of potash or alum or refined potash made; that he had sold refined potash; that he was not a professional chemist.

The witness Solmon, on redirect examination, was asked the following question:

Q. By sulphate of potash you mean what article?

(To this question the plaintiffs' counsel objected. This objection the court sustained, and to this ruling the defendant duly excepted, which exception was duly noted and allowed.)

Both sides having rested, the defendant's counsel moved the court to direct the jury to find a verdict for the defendant on the grounds:

1st. That the article in suit is provided for in the tariff act of March 3, 1883, eo nomine as "sulphate of potash."

2d. That this article is not provided for under the provision of said tariff act for "all substances expressly used for manure," inasmuch as by the provisions therein for "bone dust and bone ash for manufacture of phosphate and fertilizers," "barks, cinchona, or other barks used in the manufacture of quinine," "glass plate or disks unwrought for use

68 in the manufacture of optical instruments," and other like provisions, it is evident that the expression "all substances expressly

used for manure" means substances used for or as manure, and not substances used in the manufacture of manure or fertilizers.

3d. That this article is "sulphate of potash," and is provided for in said tariff act eo nomine as "sulphate of potash," a specific expression, and if otherwise covered by the general expression "all substances expressly used for manure" is not, therefore, provided for under such general expression; and

4th. That the plaintiffs had not proven facts sufficient to enable them to recover.

This motion the court denied, and to this ruling the defendant duly excepted, which exception was duly noted and allowed.

The defendant, by his counsel, then moved the court to allow the case to go to the jury on the question whether the article in suit was a "substance expressly used for manure."

This motion the court denied, and to this ruling the defendant's counsel duty excepted, which exception was duly noted and allowed.

Thereupon the plaintiffs' counsel moved the court to direct the jury to find a verdict in favor of the plaintiffs, which motion the court
69 granted and directed the jury to find a verdict in favor of the plaintiffs for the sum of $2,225.84.

To this ruling and direction the defendant's counsel then and there duly excepted, which exception was duly noted and allowed.

The jury thereupon found a verdict for the plaintiffs in accordance with the direction of the court.

And inasmuch as the defendant's said exceptions, matters, and things would not otherwise appear by the record of the said trial, therefore, on the prayer of the said defendant by his counsel, I have settled, allowed, and signed this bill of exceptions, and

It is ordered that the same be filed nunc pro tunc as part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand at the city of New York, in the southern district of New York, this 10th day of October, 1889.

(Signed) E. HENRY LACOMBE.

70 (Indorsed:) N. S. 12459. U. S. circuit court, southern district of New York. James E. Heller and Adolph Hirsh versus Daniel Magone. Defendant's bill of exceptions. Stephen A. Walker, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, 188 attorney for plaintiff. To attorney for plaintiff. U. S. circuit court. Filed Oct. 15, 1889. John A. Shields, clerk.

SIR: You will please take notice that a of which the within is a copy, was this day duly entered in the within entitled action, in the office of the clerk of the . Dated N. Y., 18 . Yours, etc., U. S. attorney, attorney for defendant. To , attorney for

71 Supreme Court of the United States.

DANIEL MAGONE, PLAINTIFF IN ERROR,
vs.
JAMES E. HELLER, ADOLPH HIRSH, DEFENDANTS IN ERROR. } Assignment of errors.

Afterwards, to wit, on the third Monday of October term in the same term before the justices of the said court at the Capitol in Washington, come the said plaintiff in error by Edward Mitchell, U. S. att'y, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
U. S. Att'y, Att'y for Pl'ff in Error.

72 (Indorsed:) 12459. United States Supreme Court. Daniel Magone, plaintiff in error, vs. James E. Heller & al., defendants in error. Assignment of error. Edward Mitchell, U. S. att'y, attorney for pl'ff in error. Due service of a copy of the within assignment of error is hereby admitted this 16th day of Oct., 1889. Charles Curie, attorney for defendants in error. To Charles Curie, esq., attorney for defendants in error.

73 Supreme Court of the United States.

DANIEL MAGONE, PL'FF IN ERROR,
v.
JAMES E. HELLET AND ADOLPH HIRSH, defendants in error. } Joinder in error.

And afterwards, to wit, on the third Monday of October term, in said term, the said defendants in error, by Charles Curie, their attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES CURIE,
Attorney for Defendant in Error.

74 (Indorsed:) 12459. United States Supreme Court. Daniel Magone, plaintiff in error, vs. James E. Heller et al., defendants in error. Joinder in error. Charles Curie, attorney for defendant in error.

Due service of a copy of the within joinder in error is hereby admitted this 16th day of October, 1889. Edward Mitchell, U. S. att'y, attorney for pl'ff, plaintiff in error. To , attorney for plaintiff in error. U. S. circuit court. Filed Oct. 16, 1889. John A. Shields, clerk.

75 UNITED STATES OF AMERICA, ss:

To James E. Heller, Adolph Hirsh, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the third Monday of October term, eighteen hundred and eighty-nine, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Daniel Magone is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Dated Oct. 16th, 1889.

E. HENRY LACOMBE.

76 (Indorsed): E. & A. A., 888. 12459. U. S. Supreme Court. Daniel Magone, plaintiff in error, against James E. Heller & al., defendants in error. Citation. Edward Mitchell, U. S. atty., attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 16 day of October, 1888. Charles Curie, attorney for defendants in error. U. S. circuit court, Oct. 16, 1889. John A. Shields, clerk.

(Indorsement on cover:) No. 275. Daniel Magone, collector of the port of New York, plaintiff in error, vs. James E. Heller and Adolph Hirsh. 13894. S. New York, C. C. U. S. Filed October 28, 1889.

15-02570

Office Supreme Court U. S.
FILED.
OCT 14 1893
JAMES H. McKENNEY,
CLERK.

CASE NO. 13894.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

DANIEL MAGONE, COLLECTOR OF THE port of New York, plaintiff in error,
vs.
JAMES E. HELLER ET AL.
} No. 47.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

This was one of the ordinary actions to recover duty paid under protest. The importations were made in 1887, so that the case is governed by the tariff law of 1883. The articles were invoiced as *manure salt*. They were really *sulphate of potash* with about 5 to 10 per cent of dross. The collector held them dutiable as sulphate of potash. Plaintiffs claimed that they should be on the free list as "substances expressly used for manure," paid under protest, and sued to recover the money. The court (Mr. Justice Lacombe) directed a verdict for plaintiffs for the full amount claimed.

STATEMENT OF THE CASE.

The verdict having been directed for plaintiffs against defendant's objection and exception, all material facts claimed by plaintiff in error must be assumed as established for the purposes of this hearing if they are supported by *some* evidence in the record. This is true whether or not such facts are controverted by other evidence and irrespective of the weight of evidence, provided there be sufficient to raise a question for the jury, "upon any view which could be properly taken of the facts the evidence tended to establish." (*Texas and Pacific Railroad Company* vs. *Cox*, 145 U. S., 593, 606, and cases cited.)

The following facts are claimed by plaintiff in error to be true. They are either uncontradicted or supported by some evidence in the record. The evidence will be more fully set forth hereinafter:

In *composition* the article imported was sulphate of potash. It was not, indeed, in a pure state, the dross not having been entirely removed; but the impurities amounted only to 5 or 10 per cent.

In *origin* it is stated by defendant in error to be obtained by washing and leaching kainit, its raw material, which is mined near Stassfurt, in Saxony.

Its *commercial designation* is usually sulphate of potash, though by some it is sometimes called manure salt, a name whose use in this connection bears marks of an intent to avoid the effect of the tariff laws.

In *value* it is simply worth the sulphate of potash contained in it. Its price varies according to the amount of

sulphate of potash shown by analysis, the balance being thrown out of account.

Its *usefulness* is in the manufacture of fertilizers, alum, or other chemicals. When used for the manufacture of fertilizers it is mixed with various other substances. It is sometimes sold to farmers, who make their own mixtures. One of the witnesses said that it might be used as a fertilizer by sprinkling it lightly on the soil, although he did not claim to know of its actual use in this manner, except by himself as an experiment.

Its *actual disposition by the importer* was, according to his own testimony, by sale to various manufacturers of fertilizers. This testimony was confirmed by the manufacturers as to a part of the imported articles.

Bearing upon the *intent* of the importer at the time of the importation, there is no further testimony except his own, "that, so far as his own knowledge went, such articles were used expressly for fertilizers and manures; that his firm sold to fertilizing manufacturers expressly."

ERRORS RELIED UPON.

(1.) The exclusion of testimony as to the commercial designation of the articles in question.

> Henry J. Braker, an importer of drugs, chemicals, and fertilizers, testified that the articles in question "have been sold both as manure salt and salts of potash." He was asked: "Generally by what name at that time was it bought and sold by importers and wholesale dealers in this country?" The time referred to was March 3, 1883, and prior thereto. The question was objected to as "calling for the conclusion of the witness." It was sustained by the court and

exception duly taken. The ground upon which it was sustained by the court, however, as shown by the remarks of the court on the immediately preceding question, was "the ground which I shall hereafter apply to all other questions asked, to wit, that it makes no difference what it was known as in trade or commerce, or what it really was; that the only question to be determined here is whether it was expressly used as manure. Therefore testimony as to trade meaning is immaterial." The same objection, ruling, and exception were taken upon the next succeeding question: "Do you know when the term 'manure salt' was first used in trade?" (pp. 29 to 30.)

The next witness, Salmon, an importer of fertilizing chemicals, was asked: "Will you state by what name that article S 1 [a sample of the article imported] was generally bought and sold in this country by importers and wholesale dealers therein on March 3, 1883, and prior thereto?" An objection by plaintiff's counsel, ground not stated, was sustained and exception duly taken. (p. 31.)

The last-named witness was also asked: "Will you state what that article S 1 is?" Objection, ground not stated, sustained and exception duly taken. (p. 31.)

(2) The denial of a motion to direct a verdict for the defendant on the following grounds:

First. That the article in suit is provided for in the tariff act of March 3, 1883, *eo nomine* as "sulphate of potash." Second. That this article is not provided for under the provision of said tariff act for "all substances expressly used for manure," inasmuch as by the provisions therein for "bone dust and bone ash for manufacture of phosphate and fer-

tilizers," "barks, cinchona, or other barks used in the manufacture of quinine," "glass plate or disks unwrought for use in the manufacture of optical instruments," and other like expressions, it is evident that the expression "all substances expressly used for manure" means substances used for or as manure, and not substances used in the manufacture of manure or fertilizers. Third. That this article is "sulphate of potash," and is provided for in said tariff act *eo nomine* as "sulphate of potash," a specific expression, and if otherwise covered by the general expression "all substances expressly used for manure" is not, therefore, provided for under such general expression; and, fourth, that the plaintiffs had not proven facts sufficient to enable them to recover. (pp. 31–2.)

(3.) Denial of a request on part of the defendant that the case be sent to the jury on the question whether the article in suit was a "substance expressly used for manure." (p. 32.)

(4.) Direction of the verdict for the plaintiff for the full amount claimed. (p. 32.)

It will doubtless have been perceived, however, that it is not necessary to consider separately the exceptions to the exclusion of evidence concerning the nature and commercial designation of the articles imported. Such evidence, if the case had gone to the jury, would simply have been cumulative. Some of plaintiff's own witnesses had already sworn that the article was sulphate of potash, and that its commercial designation known to them was also sulphate of potash. The court excluded further evidence on the ground that the whole matter was immaterial. As

these facts must be assumed to be true in considering the exception to the direction of a verdict for plaintiff, improper exclusion of cumulative evidence to the same effect may be deemed merely a cumulative error.

Defendant's motions for a verdict in his favor and for leave to go to the jury are also unnecessary to discuss separately. Their merits are necessarily involved in the discussion of the actual direction of a verdict for plaintiff.

HISTORY AND PAST INTERPRETATION OF THE TARIFF PROVISIONS.

The phrase "substances especially used for manure" seems first to appear in our tariff legislation in 1857, although "guano" was in the free list of 1846.

"Guano" and "substances expressly used for manure" appear each as a separate heading in the free lists in the acts of March 3, 1857, chapter 98, § 3, and March 2, 1861, chapter 68, § 23; and by the act of July 14, 1870, chapter 255, § 22, "guano and other animal manures" were placed on the free list, "in addition to imported articles now by law exempt from duty."

The Revised Statutes, section 2505, incorporated into the free list as separate headings, in their respective alphabetical order, "guano and other animal manure," and "substances expressly used for manure."

The tariff act of 1883, chapter 121, incorporates both under one heading in the free list as "guano, manures and all substances expressly used for manure."

The words "expressly used" came up for interpretation in the Treasury Department at least as long ago as

1869, and were construed as equivalent to the words "only fit for use," making *usefulness* the test. "If the dung salt can be used, as stated by the appraiser's report, for other purposes than manure, it can not be classified under section 23, act March 2, 1861, and exempted from duty as substances expressly used for manures." (Letter to collector of Baltimore, November 20, 1869.) "So-called kalidunger, or dung salt, if it contains less than 50 per cent of potash, cannot profitably be used for any other purpose than manure, and may be entered free of duty under section 23," etc. (Do., December 4, 1869, and January 28, 1870.) The latter decision was modified by reducing the necessary proportion of free potash to 30 per cent. (Do., August 2, 1870.)

March 24, 1884, the question was raised in the Department whether articles entered under this head should not be subjected to duty if afterwards actually diverted to other uses. Acting Secretary French, in deciding to the contrary, said that the expression "is to be taken as descriptive of a class of merchandise, and not as requiring the classification of substances according to the purpose for which the particular importation is actually used. As the specified importations belong to the class which are ordinarily used for manures, they were in my opinion correctly classified, and so were exempt from duty." (Syn. Dec., No. 6264). The Department's decision as to sulphate of potash (April 7, 1886, Syn. Dec., No. 7452) was on the principle that the latter was the more specific designation.

Sulphate of potash was on the free list in the Ways and Means Committee's bill of 1857, but was stricken out in conference. It first appears in the act of 1883 under the head of "potash," as follows: "Sulphate of, 20 per centum ad valorem." Grouped with it in the dutiable list are a majority, though not all, of the salts of potash. Previously, it seems to have been included in the various tariff acts under the general head of salts not otherwise provided for (act of August 30, 1842, chap. 270, sec. 8; act of July 30, 1846, chap. 74, sec. 11; act of March 2, 1861, chap. 68, sec. 20; R. S., sec. 2504). By the act of 1890 it is added to the free list.

Muriate of potash (which is also familiarly used in the manufacture of fertilizers) first appears in the act of July 14, 1870, being placed *eo nomine* in the free list (act of along with "phosphates, crude or native, for fertilizing 1870, sec. 22; R. S., sec. 2505; act of 1883, sec. 2593), purposes," and "bone-dust and bone-ash for manufacture of phosphates and fertilizers." In the act of 1883 appears also "carbon, animal, fit for fertilizing only"

No reported case construes any of the above provisions until we reach the case at bar, which is reported as *Heller* v. *Magone* (38 Fed. Rep., 908). The report contains the oral opinion of Mr. Justice Lacombe upon the motions to direct a verdict, in which the justice, after some general remarks in favor of construing each clause of the statute according to its own evident intent, without "strained and over-elaborate examination" of the other paragraphs in the same act, goes on as follows:

> It is very true that the use of the word "expressly" may make this paragraph difficult of ap-

plication in very many cases; in fact in all cases, so far as the collector is concerned; but it gives us no trouble in this particular action, because there is abundant evidence here to warrant the holding that these particular importations were expressly used for manure. They have been traced from their importers into the hands of individuals whose sole business is the preparation of "fertilizers," which word is a mere synonym for manure; and should the jury draw from the testimony any other inference than that the articles were expressly used for manure, I should be inclined to set aside the verdict. Therefore I think it is unnecessary to send the question to them. The defendant refers to the well-settled rule of interpretation that a specific designation will prevail over a general one, but the clause which he contends to be a general one (section 505, *supra*) is in reality more specific than the paragraph under which he insists these imports should be classed (paragraph 70, "sulphate of potash,") *because from the general class of articles properly classified as sulphate of potash it differentiates that smaller portion which are "expressly used for manure."*

The same question came up again in *Schultz* v. *Cadwalader* (43 Fed. Rep., 290), in the charge of Mr. Justice McKennan to the jury as reported.

The court refers to the case at bar as "strikingly similar;" adopts the views of Mr. Justice Lacombe, "as there ought to be uniformity of decisions, of course, on questions, especially under the tariff law, and as it is just and right, so far as possible, they ought to be decided the same way;" and makes "express use" equivalent to "the use to which the article *is to be applied*;" or again, equivalent to "the use to which this article *is applicable*, or for which

it is to be expressly used." He proceeds: "I do not see what other construction could be given to the act of Congress than this: that dutiable articles, if they are *intended for use, or are imported for the purpose of being used*, in manure, are relieved from the duty of 20 per cent." The question "is to be determined by the *purpose* for which it is used or to be used. Was it for manure? If so, under the view Judge Lacombe takes of the law, it is not subject to duty, and in that decision I am inclined to concur." The court charges that there is no question of fact as to the *intent* of the importation, which was that the article imported was to be used in the manufacture of fertilizers. The court, however, left to the jury the question, what was the *actual use* to which the article was put after importation *by the person to whom the importer sold it;* holding that the collector was bound to inquire what became of the goods after they were sold, and saying:

"However difficult it might have been for him to ascertain that fact, yet it would seem to be necessary to the effectuation of the attempt of Congress in relieving such articles from duty altogether, *to inquire into the use to which this article was applied after it passed into the hands of the manufacturer.* I therefore instruct you, if you find that this article *was used* in the manufacture of manure, or *was used* as manure, that it is not subject to a duty, and your verdict should be for the plaintiff."

In closing, the judge reiterated that his decision was made "taking the view that was taken by the judge of the circuit court of the United States at New York, and desiring that there should be unanimity of opinion upon the construction of the act of Congress as far as possible."

The rules laid down by Mr. Justice Lacombe, as interpreted by Mr. Justice McKennan, are, therefore, as follows: (1) "All substances expressly used for manure" is a more specific term than "sulphate of potash;" (2) being more specific, it prevails when both terms are applicable to the same imported article; (3) the test of *express* use is not the *capacity for use* nor yet alone the *intent* of the importer at the time of the importation, but it is the *actual use* to which the article shall be put *by the person to whom the importer sells it.* It seems necessarily to follow that the collector is to collect the duty in every case; and subsequently to refund it if he is satisfied that the article imported has all been actually used in the manufacture of fertilizers.

ARGUMENT.

I.

THE ARTICLE IMPORTED WAS SULPHATE OF POTASH, AND THIS WAS ITS ONLY TRUE COMMERCIAL DESIGNATION, AT LEAST AT THE TIME WHEN THE TARIFF ACT OF 1883 WAS PASSED.

As already shown, we are entitled to assume these facts as established, even if they be supported in the record by *some* evidence only. We believe that they are shown not merely by some evidence, but by preponderating evidence.

It is true that the article is not imported in an absolutely pure and clean state. It is therefore not in condition for sale to chemists or apothecaries without further cleansing, and has not the same external appearance as the

pure white crystallized or powdered sulphate of potash handled by wholesale druggists. But the plaintiff Heller had himself to admit, as his own invoices showed, that the imported article was valuable only for the sulphate of potash contained in it. The impurities were thrown out of account in fixing the price. The price was ascertained, as is so common in the chemical importing trade, by starting with the assumption of a conventional standard of purity, for which a general rate is quoted, and then arriving at the price of each separate lot by its own separate analysis; thus, to take the second invoice (as affording a more simple computation than the first): The lot is stated to contain 50,000 kilograms, at $8,400 for 90 per cent of sulphate of potash (this being the conventional standard of purity). The analysis shows that this particular lot contains 93 per cent of the salt. This gives the following proportion:

90 : 8,400 :: 93 : 8,680.

$8,680, therefore, less cash discount, commissions, and an additional special discount, is the invoice price of the lot (pp. 9 to 13). The goods were sold by the importers on the "basis of 90 per cent sulphate of potash, foreign analysis" (pp. 18, 23).

Even kainit, the raw material, is always "sold on the basis of the sulphate of potash it contains" (p. 20). It is clear from the evidence that the washing and leaching process to which kainit is subjected in Saxony, as described by the plaintiff (pp. 11 to 12), is simply to reduce its bulk for convenience of exportation, while, on the other hand, no attempt is made abroad to render the salt absolutely

pure, since, if used for fertilizing purposes, it is not necessary that its purification should be carried beyond the point where the expense of purification equals the saving in freight. For fertilizing purposes, indeed, the imported article seems never actually to be used by farmers except after mixing it up again with animal manures or other substances.

The collector was not allowed to introduce any testimony as to the *commercial designation* of the invoiced article. Plaintiff's own witnesses, however, supplied plenty of testimony in support of the defense on this point.

> Cord Meyer, a manufacturer of fertilizers, "testified that he bought the article of the kind of those in the five bottles marked S 1 [the samples submitted by Heller] in 100-ton lots or 50-ton lots, under the name of sulphate of potash; * * * that he called it sulphate of potash to distinguish it from muriate of potash and other potash, such as kainit and double manure salt; *that he did not think he ever bought it under the name of manure salt; only as sulphate of potash for fertilizing purposes*" (p. 17).
>
> Edward V. Z. Lane, of the Mapes Formula and Peruvian Guano Company, "testified that sulphate of potash was one of the names by which these articles were known;" that the lower grade, testing 48 to 50 per cent, "was called sulphate of potash and double manure salt; that double manure salt was one of the names, but not always; whether most generally he did not know; *that his company called it sulphate of potash in all their publications, sold it as sulphate and bought it as sulphate;* that he could not say whether they bought and sold the article in the

five bottles marked S 1 as sulphate of potash, because the paper Exhibit 5 [Heller's bill of sale to them] was made out as high-grade salt; that they bought the lot under that paper knowing perfectly well what it would be; that it was to contain 90 per cent sulphate of potash; *that it was essentially sulphate of potash according to his idea;* at the same time *it was bought as* high-grade manure salt, the two meaning the same thing to them, really * * * that they called it all sulphate of potash, whether the basis was 48 or 95 per cent, and they called it by other names; that, whether the article of 48 per cent sulphate of potash and the 95 per cent basis was generally known as sulphate of potash he could only say from his own experience; that he did not know about the trade of others; that they called it in their publications sulphate of potash, the 45 to 50 and the 90 to 98 per cent" (pp. 18 to 19).

Even George F. Taylor, a fertilizer broker (and brokers are apt to be the strongest experts for the party calling them), admitted that he had heard the article called sulphate of potash, and would not say positively that it was not generally bought and sold under that name to distinguish it from other kinds of manure salt. He called the articles manure salt, but made an exception of one of the five lots, which contained 95 per cent of sulphate of potash, and which "he should designate as sulphate of potash to distinguish it from the lower grades." [There were actually two lots out of the five invoiced at 95 per cent and over, and a third at 94.9 per cent.]

Emanuel S. Kuh, a jobber in fertilizing materials, recognized an article known as manure salt, containing sulphate of potash in quantities up to 95 per cent, but stated that it "was always billed to him as sulphate of potash" (p. 21).

Charles M. Stillwell, a consulting chemist, testified that the article was "known in commerce as high-grade manure salt or high-grade sulphate of potash" (p. 21).

Joseph H. Gilmore, general office manager for a fertilizing manufacturer, testified that the article was called sulphate of potash if it contained a comparatively small percentage of that article, but high-grade double manure salt if it contained as much as 90 per cent; but, on further cross-examination, "he could not say that he had not, as a matter of fact, known the articles as the same kind as those in the suit under the name of sulphate of potash, more than he had under the name of manure salt; *that when his firm sold them, they called them sulphate of potash*, and sometimes they called them double manure salt and sometimes high-grade salt, sulphate of potash, or double manure salt; that *the plaintiffs in this action advertised them* for sale as high-grade manure salt" (p. 24).

Henry J. Braker, a dealer in drugs, chemicals, and fertilizers for over fourteen years, was asked by defendant's counsel to state "when the term 'manure salt' was first used in the trade." Objection was made on the ground that the question asked for the conclusion of the witness, a ground which hardly needs comment and was not sustained by the court. The court, however, excluded the evidence as immaterial, and defendant was thus debarred from showing that the term was not used until after the passage of the act of 1883.

The above extracts from the evidence would seem to make it clear that the imported article was sulphate of potash and was commercially known as such. The Reporter came to this conclusion (38 Fed. Rep., at p. 909),

and Judge McKennan in the case before him regarded it as "beyond all question." (43 Fed. Rep., at p. 291.) Judge Lacombe seems tacitly to assume the same thing.

II.

THE GOODS IMPORTED WERE NOT ESTABLISHED TO BE SUBSTANCES EXPRESSLY USED FOR MANURE.

The word "expressly" is extremely ambiguous. It is so ambiguous that it will not exactly fit any reasonable interpretation. Some liberty of speculation is necessary in dealing with it. It is so ambiguous that it has received three different interpretations, all indeed found in Judge McKennan's opinion above quoted. "Expressly used" has been tested by the *actual subsequent use*, by applicability or *possibility of use*, and by the *purpose of use* at the time of importation.

(A) Judges Lacombe and McKennan hold the *actual subsequent use* to be the test. This test, as above pointed out, necessitates great circuity of procedure and difficulty of proof. The collector must always collect the 20 per cent duty, because he can not, of course, tell for certain how the article is going to be used. Whenever any particular lot imported has been actually used, a *quasi*-judicial proceeding will be had before him to decide whether the use can be satisfactorily proved to be such as to bring the article within the exemption. If so, then the Government suffers a loss of interest on the amount of the duty for the period in which the article is being used. The test is a simple one to apply retrospectively, as upon

the trials of the lawsuits reported in the Federal Reporter; but it is entirely inconsistent with due administration of the tariff act. It is unreasonable and absurd, and therefore plainly inadmissible within the authorities. (*Gyger's Estate*, 65 Pa. St., 312, quoted in *Heydenfeldt* vs. *Daney Gold Co.*, 93 U. S., 634, 638; *State* vs. *Clark*, 29 N. J. Law, 96, 98–9, quoted in *Holy Trinity Church* v. *United States*, 143 U. S., 457, 460; *United States* vs. *Kirby*, 7 Wall., 482; *Oates* vs. *National Bank*, 100 U. S., 239, 244; *Chew Heong* vs. *United Sates*, 112 U. S., 536, 555; *Pierson* v. *People* 79 N. Y. 424, 434; Endlich on Interpretation of Statutes, §§ 251–2, 264, 295.)

Such a construction would render unreasonable the administration of the tariff laws, not only with respect to these substances, but also with respect to "woods used expressly for dyeing," "outside garments for ladies and children's apparel, and goods * * * used for like purposes," etc., in other parts of the tariff laws.

(B) Another possible interpretation of the statute would make *intent* the criterion, so that the words "expressly used" should be read as equivalent to "imported for the purpose of being used."

Intent on the part of the importer is a difficult thing to prove or disprove, but the criterion is far more practicable than that of subsequent actual use. It is the criterion adopted by the circuit courts for construction of the somewhat similar exemption in the tariff laws of "animals specially imported for breeding purposes," which raises a question of fact as to the intention of the importer at the

time of the importation, and does not prevent a *bona fide* change of mind on his part afterwards. (*United States* v. 11 *Horses*, 30 Fed. Rep., 916.) But for reasons stated under the next head, we believe this construction also to be erroneous.

Moreover, the proof is insufficient to sustain the direction of a verdict on this construction, there being no evidence of intent at the time of importation further than Heller's own statements (at p. 12). But it is respectfully submitted that it was erroneous to direct a verdict upon his testimony alone, both because he was an interested witness, so that the jury were at liberty to disbelieve him without contradiction or impeachment, and because his own examination showed him to be an untrustworthy witness whom they were at liberty to disbelieve irrespective of his interest in the case.

Modern improvements in procedure have given parties the new right to testify in their own behalf. The statutory amendments have not gone so far as to bind the jurors by their testimony when uncontradicted. On the contrary, the weight of authority is that such testimony is to be regarded, for the purposes of a motion to direct a verdict, as contradicted by the interest of the witness. (*Quock Ting* vs. *United States*, 140 U. S., 417, 421, quoting *Kavanagh* vs. *Wilson*, 70 N. Y., 177; *Volkmar* vs. *Manhattan Ry. Co.*, 134 N. Y., 418; *McNulty* vs. *Hurd*, 86 N. Y., 547; *Dean* vs. *Metropolitan Ry. Co.*, 119 N. Y., 540; *Sipple* vs. *State*, 99 N. Y., 284, 289; *Robinson* vs. *N. Y. C. and H. R. R. R. Co.*, 20 Blatchf., 338.)

Nor can a verdict be directed based on the testimony of a witness who has given grounds on the stand for a reasonable doubt as to his veracity (*Quock Ting* vs. *United States*, *supra*).

On cross-examination Heller testified positively that his firm *did not deal in sulphate of potash*. He was then shown an advertising card, which he admitted to be a card of his own firm, and which contained sulphate of potash in the list of goods dealt in; but he reiterated the statement and said he thought that the card shown him might be ten years old (pp. 13 to 14). It was proved by a clerk in the district attorney's office that the card was delivered and him by a representative of Heller's firm, at its office, a week or two before the trial, as the card of their house. The card contained, under the head of "specialties," *sulphate of potash*, muriate of potash, kainit, and many other articles named "and all other fertilizing materials," but *did not contain manure salt* (p. 25). Another clerk in the district attorney's office testified that on the day before the trial he asked one of the persons employed by Heller's firm, at their office, for Sulphate of potash grades 90 and 95; that the clerk called on a much older person who sat behind the cashier's desk; that the young person, by direction of the older person, then gave witness two bags on which were written "Sulphate of potash. Heller, Hirsh & Co., 164 Fort street," with the percentages 97.40 per cent and 48 to 50 per cent, respectively (pp. 25–6). Heller, at a previous stage of the trial, had been shown the bags, but was unable to recognize the figures and writing.

(C) The Treasury Department in the suits above quoted makes the test the *possibility of use*. If the article is useful only for manure, then it is exempt from duty according to the departmental construction of the statute. If it is useful for any other purpose, then it is dutiable. Departmental construction for so long a period is controlling, unless there are most cogent reasons to the contrary (*Robertson* vs. *Downing*, 127 U. S., 607; *Schell* vs. *Fauché*, 138 U. S., 562, 572). Moreover, this construction began in 1869, five years before the Revised Statutes and nearly fourteen years before the act of 1883. Hence it must be presumed that Congress in twice repeating this ambiguous phrase had in mind the already settled departmental practice. This is the recognized rule with respect to judicial construction (*Dollar Savings Bank* vs. *United States*, 19 Wall., 227, 237; *The Anna*, *L. R.* 1 *P. D.*, 253, 259), even where the former statute and judicial construction belong to another State (*McDonald* v. *Hovey*, 110 U. S., 619, and cases cited; *Metropolitan R. R. Co.* v. *Moore*, 121 U. S., 558, 572). Departmental construction is similar in effect except as to weight (*Schell* vs. *Fauché*, 138 U. S., 562, 572, and cases cited), and the rule above mentioned should apply here if there is a presumption that the decisions of the Department were brought to the attention of Congress as is clearly the case with the published decisions of the Secretary of the Treasury (*Maddox* vs. *United States*, 20 Ct. Cl., 193–198).

Defendant's witnesses in the case at bar testified that goods like those imported can be used for other purposes than the manufacture of fertilizers, namely, for the manu-

facture of alum and other chemicals, as bichromate of potash and refined potash (pp. 30 to 31). Stillwell, plaintiff's consulting chemist, admitted that the goods could be used in the manufacture of alum, although he had not known of their being so used actually (p. 23).

If the third interpretation of the statute be the true one, then the collector was at least entitled to go to the jury on this evidence.

III.

EVEN IF THE ARTICLE IMPORTED WERE A SUBSTANCE "EXPRESSLY USED FOR MANURE," STILL, AS IT IS SULPHATE OF POTASH, IT IS DUTIABLE UNDER THE LATTER DESIGNATION.

(A) It is respectfully submitted that "sulphate of potash" is the specific phrase, as compared with "substances expressly used for manure." It seems difficult to understand the course of reasoning which led the court below to a contrary conclusion. Plaintiffs themselves classify sulphate of potash as the more specific designation on their advertising card, as follows:

> Specialties: Blood albumen, egg albumen, starch, bone black, brimstone, hoofs, ground bones, tankage, dried blood, azotine, sulphate of ammonia, nitrate of soda, *sulphate of potash*, muriate of potash, kainit, kieserit, mineral phosphates, acid phosphate, *and all other fertilizing materials*.

Plaintiff's consulting chemist, Stillwell, makes a similar classification when he states "that the term manure salt was applied to perhaps only three articles, kainit, sulphate

of potash, so called, or the double sulphate of potash and magnesia, and muriate of potash and kieserit" (p. 22).

It is an elementary rule in the interpretation of tariff acts that the more specific designation controls. (*Hartranft* vs. *Meyer*, 135 U. S., 237; *United States* vs. *Perry*, 146 U. S. 71, 75).

But this is a stronger case than one of conflicting and more or less specific designations. To adopt the language of the court in *Robertson* vs. *Glendenning* (132 U. S., 158), the words "sulphate of potash" are "*denominative* and not merely *descriptive*, and when an article is *designated by a specific name and a duty imposed upon it by such name*, general terms in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it."

> It is a familiar rule in revenue cases that, where Congress has designated an article by a *specific name* and imposed a duty upon it, general terms in the same act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation, rather than under a general description. (*Am. Net and Twine Co.* v. *Worthington*, 141 U. S., 468, 474, citing authorities.)

In was on this principle that "thread laces" were still held dutiable *eo nomine*, after a subsequent statute had imposed a different rate of duty on all manufactures of silk not otherwise provided for. Mr. Justice Hunt said:

> A specific designation *eo nomine* must prevail over general words, and a commercial designation is the standard by which the dutiable character of the arti-

cle is fixed. (*Arthur* v. *Lahey*, 96 U. S., 112. See also the Chocolate Confectionery case, *Arthur* v. *Stephari*, 96 U. S., 125.)

An apparent exception to the general rule is *Ferguson* v. *Arthur* (117 U. S., 482, 488), which held "Henry's Calcined Magnesia" dutiable as a proprietary medicine and not as calcined magnesia. The ground of the decision seems, however, to have been that the proprietary article was not calcined magnesia in the ordinary commercial understanding of the term, but had a distinct character, and was not shown to have been made by the same formula.

(B) Comparison of other portions of the same tariff act confirms the argument that sulphate of potash was not intended to be included under "substances expressly used for manure." Muriate of potash, which, like sulphate of potash, is a familiar ingredient in the manufacture of fertilizers, as testified to by plaintiff's witnesses (pp. 19, 20, 21, 22, 23 and 24), and which appears on plaintiff's business card as a fertilizing material (p. 25), is expressly placed on the free list by the tariff of 1883; as are phosphates, bone dust, bone ash, and carbon, used for like purposes.

With all respect for the learned circuit court, we cannot read the phrase "substances expressly used for manure" as bearing any plain meaning on its face; and if it is ambiguous, it is certainly proper to resort to other portions of the same act (*Robertson* vs. *Gerdan*, 132 U. S., 454), and to previous tariff acts (*Robertson* vs. *Rosenthal*, 132 U. S., 460), as aids to its interpretation. (*Viterbo* vs. *Friedlander*, 120 U. S., 707, 725–6 and cases cited.)

Perhaps the various provisions of the act of 1883, and the fact that these two familiar fertilizing ingredients, sulphate of potash and muriate of potash, now first appearing specifically in tariff legislation, appear separately and in different schedules, may be best explained, as was done by the collector's counsel on the trial, by distinguishing between a use *for manure* and a use *as an ingredient of manure*. There was no proof on the trial that sulphate of potash had ever practically been used by a farmer as manure *per se*.

(C) A further rule of construction seems to have been overlooked by the learned court.

Prior to the act of 1883 it had always been a canon of construction as to tariff acts that, other things being equal, the court should lean toward the importer. (*United States* vs. *Wigglesworth*, 2 Story, 369; *Hartranft* vs. *Wiegmann*, 121 U. S., 609, 616; *Partington* vs. *Attorney-General*, L. R. 4 H. L. 100, 122.)

But the act of 1883 overthrew this maxim and enacted the precise opposite. Amending the well-known section 2499 of the Revised Statutes, it inserted the following new provision:

> If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates.

"It was no doubt within the power of Congress to abolish a well-known rule of construction." (*Arthur* vs. *Morrison*, 96 U. S., 108, 112.) The *obiter* reference to the old rule as still existing, in *Earnshaw* vs. *Cadwalader*, 145 U. S., 247, 262, it is submitted, must be regarded as an inadvertence.

This evidences an intention that the construction should be against the importer and in favor of the Government. While this clause, by its literal construction, would not apply to a question between a rate of duty and the free list, yet it was the evident intent of the act that the rule of construction should be general. The free list by a familiar rule of construction should, therefore, be brought within its scope. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter * * * . The meaning of the legislature may be extended beyond the precise words used in the law * * * ;" provided that "the case must be shown to come within the same reason upon which the lawmaker proceeded and not only within a like reason." (*United States* v. *Freeman*, 3 How., 556, 565; *United States* v. *Babbit*, 1 Black., 55, 61; *Stewart* vs. *Kahn*, 11 Wall., 493, 504; *Atkins* vs. *The Disintegrating Co.*, 18 Wall., 272, 301.)

It was by a somewhat similar application of this rule of construction that the preceding clauses of section 2499 were extended so as to cover enumerated as well as non-enumerated articles. (*Hartranft v. Meyer*, 135 U. S., 237, 239.)

It is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

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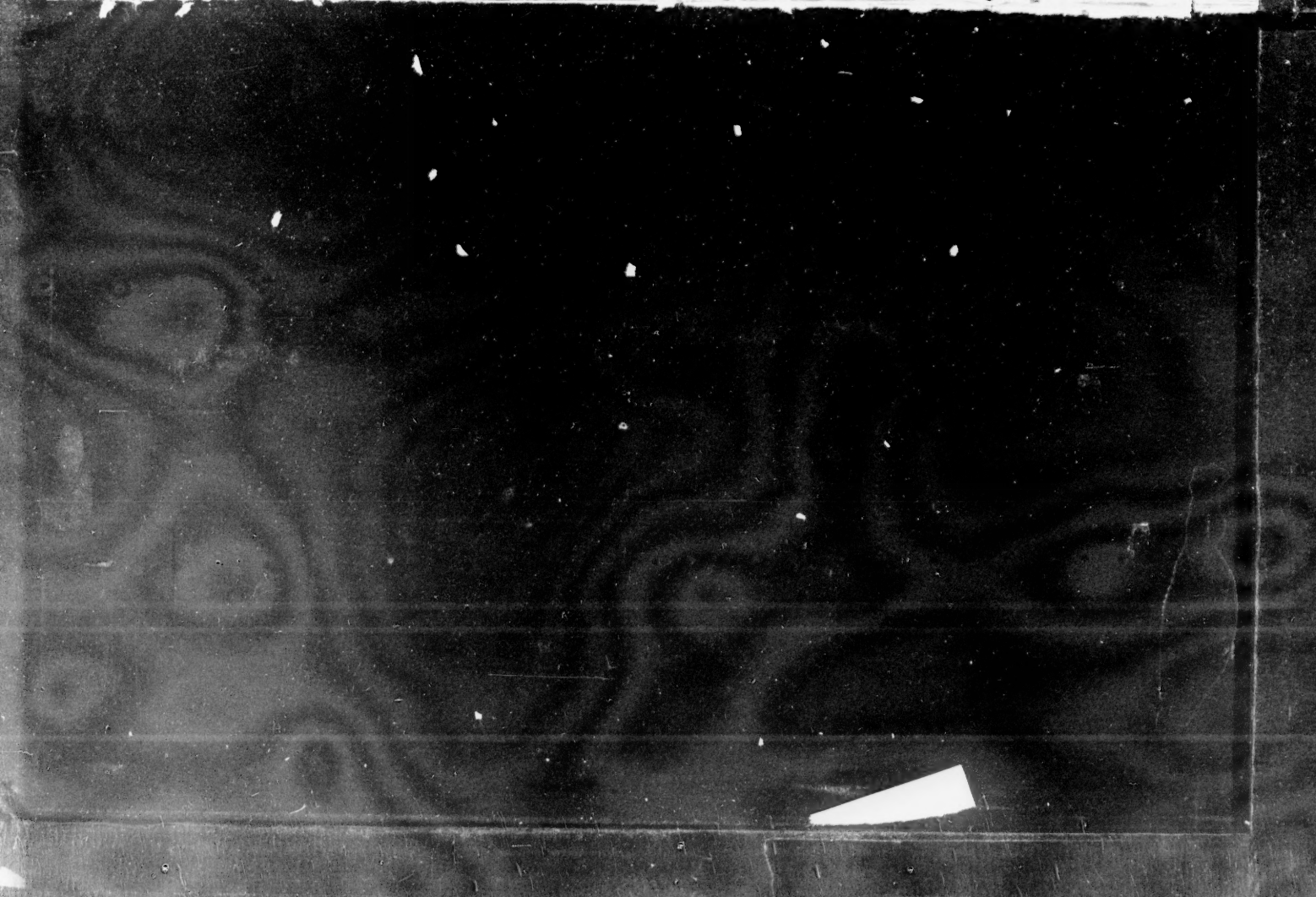

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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 47.

DANIEL MAGONE

vs.

JAS. E. HELLER ET AL.

BRIEF FOR DEFENDANTS IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

DANIEL MAGONE vs. JAS. E. HELLER ET AL.	No. 47.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

In 1887, Heller, Hirsch & Co. imported into New-York three invoices of "manure salt" from Germany, which Mr. Magone, then collector, classified for duty as 'sulphate of potash' under the provision for that article found in Schedule A, tariff of 1883, viz.;—

"Potash . . . Sulphate of, 20% *ad valorem*." (22 Stats. 493.) Against this classification, and the duty exacted and paid in accordance therewith, the importers seasonably protested, and took all proper steps for the judicial determination of the question raised by their protest, the substantial part of which is as follows;—

"Claiming that said article is made and imported expressly for use as manure, and is expressly so used, and is entitled, therefore, to free entry under the provision for 'all substances expressly used for manure' in the free list, act March 3, '83.

"SECOND. We separately protest against your assessment of 20 per cent. *ad valorem* on said article as 'sulphate of potash,' claiming that while said article may probably contain sulphate of potash to a greater extent than any other of its component elements, that it is nevertheless in fact and commercially a different article, being a compound containing other ingredients besides sulphate of potash and commercially known as 'manure salt' and expressly used for manure, and therefore entitled to free entry by the provision of the free-list act, March 3, '83, T. I., 505, and not 20 per cent. *ad valorem*, or 25 per cent., or as charged by you." (Rec. 10, 11.)

Samples of all the importations having been introduced, it was testified that they came from Germany, province of Saxony, where it was mined, and then known as 'kainit;' after being crushed, it was washed or leached until all the common salt it contained was washed out; the residue was sulphate of magnesium, chloride of magnesium, and sulphate of potash. Those parts of the 'kainit' of no use for fertilizing purposes were extracted by washing; the balance, sulphate of potash, left after the sulphate and chloride of magnesium were washed out, as well as the salt, was burned in a kiln to a dry crisp, and came over here in that condition, as shown by the samples; and was 'manure salt.' The burning in the kiln was only sufficient to evaporate the water; it was not subjected to a calcining heat. (Rec. 11, 12.)

All these importations were sold to manufacturers of fertilizers. (Rec. 12, fol. 25.)

Heller, Hirsh & Co. have imported 'manure salt' similar to the samples since 1882; which, so far as they knew, was used expressly for fertilizers and manures; having been sold to fertilizer-manufacturers expressly. *(Ibid.)*

It was sold upon the basis of containing 90 per cent. sulphate of potash, or 44 per cent. of pure potash in the shape of sulphate. *(Id.*, fol. 26; and 13 top.*)*

Defendant offered testimony (which was excluded)

tending to show that 'muriate of potash,' (and, perhaps, other articles) mentioned *eo nomine* in the free list were used in the manufacture of fertilizers. (*Id.* 13 middle.)

Plaintiffs' testimony tended to show a different article commercially known as 'sulphate of potash'; that our importation was not so known, commercially; but was known as "manure-salt"—there being a class of articles embraced in the term manure-salts (in the plural); while defendant called witnesses to prove it was known by both names; which testimony the Court excluded as immaterial. (Rec. 15–31.)

It was abundantly proven that our importations were consumed in the manufacture of fertilizers. (Rec. 17–19; 21; 23 and 24.)

POINTS.

Our importation was assessed with duty because of the large proportion of potash, in the form of sulphate, it contained; so that it was known as 'sulphate of potash,' which is enumerated by name in the Act of 1883. That is to say, first mentioning the base—"Potash"—the statute proceeds to levy different rates upon the salts, viz.: Crude or caustic, 20%; Chlorate, 3 cents a pound; Hydriodate, Prussiate, Nitrate and Sulphate, etc., etc. (22 Stats. 493.)

It was argued that this enumeration eliminated the article from that class of substances to which it commercially belonged, to wit, those "expressly used for manure," and denied to it the privilege of free entry accorded to similar substances not mentioned in the dutying part of the Act of 1883.

An examination of the free lists of this act, of its predecessor and of the existing law, readily refutes this argument.

It will be found, in numerous instances, that the articles usually subject to a duty, declared by the earlier provisions, are exempted when brought in for a specified use, or by a privileged user.

Whenever any other provision is to be preferred over that giving an exemption, the exempting clause so states explicitly.

First comparing the duty clauses with the free list of the Revised Statutes, in support of our contention, we find "Acids"—acetic and many other;—"and all other acids *of every description*, used for *medicinal* purposes, or *in the fine arts*, not otherwise provided for, ten per centum *ad valorem*." (R. S. 2d Ed. 473.)

The free list exempts acids, arsenious and other; "and all acids *of every description* used for *chemical* and *manufacturing* purposes, not otherwise provided for." (*Id.* 482.)

Thus, the same acid, dutiable if to be used medicinally, would be exempt if for use in manufacture.

Live animals, generally and *per se*, pay 20 per cent. *ad valorem* (R. S. 473.) If brought in temporarily for exhibition; or, permanently, for breeding purposes; or by an immigrant, to facilitate his immigration; they are exempt. (*Id.* 482 bottom.)

Here is the case which upsets the government's theory; the very article affected with duty generally, in one clause, is exempted in another, when brought in to subserve a purpose or use which Congress desired to encourage. But a Collector or Secretary of the Treasury has no right to require *more* for the accomplishment of the indicated purpose than the statute requires. Congress meant to promote it only by the prescribed means, and so far as these would have that effect. Accordingly, if animals are imported for breeding purposes, the Secretary or Collector cannot affect them with duty because *he* does not consider their breed worthy of perpetuation.

Morrill vs. Jones, 106 U. S., 466.

Obviously, animals "specially imported" for breeding purposes can also subserve their ordinary domestic uses: the ram can be shorn of his fleece, the stallion pull in harness, etc. It is the object inducing the importation of that particular beast which exempts from, or subjects to, duty.

To continue with the free list of the revision:—"Articles imported for the use of the United States," etc. (R. S. 483.) This must include *all* articles, whether elsewhere dutied by name or not. As the district-attorney below laid stress upon the fact that certain things used in making fertilizers were specified in the free list—arguing that these would not have been mentioned by name if included in the word 'substances'—let us see how the statute meets this argument, as to the provision of the free list we have just reached. Having exempted *all* 'articles imported for the use of the United States,' it specially exempts "*books*, etc., imported by authority for use of the United States, or for use of the Library of Congress; copper, when imported for the U. S. Mint; plants, trees, etc., and seeds, imported by the Department of Agriculture or the U. S. Botanical Garden."

Books are dutied 25 per cent. (R. S. 474); but, if imported for the use of the U. S., there can be no doubt that they would come in free, as "articles" so imported, notwithstanding the other specifications—with or without them. (146 U. S. 238–9.)

"Books," etc., pay 25 per cent. (R. S. 474); unless printed twenty years prior to importation; in which case they are free *(Id.* 483, bottom.) So, they may be dutiable to-day, and free to-morrow, by the mere efflux of time.

They pay 25 per cent.; but duplicates in any one invoice can be brought in free for the use of any literary society, etc., etc.; if pertaining to the profession of an in-comer, or used in his family abroad.

If it be said that the same word (books) is employed in the dutying and in the exempting clause, we will

refer to the term following this in the last-mentioned clause, viz.: "Books, *household effects*," etc. (R. S. 484 top.) This phrase, as well as "personal effects," *must* frequently include articles dutied *eo nomine* in the preceding part of the statute; and might many things individualized in the free list, like bed-feathers, etc., etc.

Ex gr, "carriages" are dutied *eo nomine* at 35 per cent. (R. S. 474); yet, if brought by a returning citizen for his own use, it comes in free under the term "household effects." Arthur vs. Morgan, 112 U. S. 495. This is precisely parallel with the cause at bar, so far as a general term in the free list covering something dutied by name, when the *condition* of free entry is fulfilled. "Silk shawls, scarfs, hose, etc.; woolen shawls, hats of wool," etc., etc., are specifically dutied; yet come in free, under the general phrase "wearing-apparel and personal effects" of the owner and user; although, too, wool "wearing-apparel of every description" (R. S. 472) is also a subject of duty. In the exempting clause, 'wearing-apparel' is not restricted to those articles embraced within it in the dutying clause, but also includes many, like those above mentioned, specified for duty. Arnold vs. U. S. 147 U. S. 496.

We had prepared a long list of similar instances; but the above suffices; and, upon comparing the free list of the Act of 1883 with that of the revision, we find them so very similar that we forego our purpose to examine that also in detail.

There is an instance, in the Act of 1883, where the Government has made, and abandoned, the same contention it offers in the present; Judge WHEELER having ruled the same in that cause that Judge LACOMBE did in this.

Rev. Stats., p. 476, and the Act of 1883 (22 Stats. 512) imposed ten per cent. on all unspecified "grease," and let in free 'soap-stocks' and "grease for use as soap-stock *only*," in separate clauses, arranged alpha-

betically. (22 Stats. 521, 519.) It was claimed by the Collector that duty must be paid on all grease *capable* of any other use than to make soap; that it was such grease as, upon sight, when imported, could be seen to be fit 'only' for soap-stock. Judge WHEELER held the statute to mean that *the importation* of the designated article should be exempt from duty, when imported to be used for making soap; and not when imported for any other purpose; that the design with which it was imported was the controlling element. The United States sued out a writ of error, but it was abandoned by the Solicitor-General at the last term of this Court.

Robertson vs. Atterbury, No. 115 Oct. Tr. 1892.
Memo. of Dismissal, 149 U. S. 784.

The Act of 1883 put fifty cents a hundred pounds upon "foreign-caught fish . . . whether *fresh*, smoked," etc. (22 Stats. 503.) It also dutied "mackerel, one cent per pound." *(Ibid.)* It exempted from duty "fish, fresh, for immediate consumption;" also "fish for bait." *(Id.* 519.*)*

Judge BLODGETT held that, if brought in fresh to be salted, pickled, etc., such fish would be dutiable; but if "for immediate consumption" [or for bait] they would be free.

Cross vs. Seeburger, 30 Fed. R. 427.

"Mackerel," though enumerated, would be entitled to exemption as "fish, fresh," if brought into port in that condition "for immediate consumption."

Sulphate of potash, *per se*, pays 20% duty; but if it be brought here expressly to be used for manure, it is exempted from that, and all, duty.

Schultz vs. Cadwallader, 43 F. R. 291.
Solomon vs. Arthur, 102 U. S. 212.
Hartranft vs. Meyer, 135 *Id.* 239.

To make these two clauses stand together, the con-

struction adopted by Judges BLODGETT, LACOMBE and WHEELER must be followed. Out of the mass of sulphate of potash, subject to duty, is excepted that imported expressly for manure. Specification by purpose separates it as absolutely as a designation by name. A fund, or an article, dedicated to a purpose is set apart from all its like. Sulphate of potash is absolutely the subject of the first clause; relatively, that of the second—with relation to the purpose it is to subserve; which is the primary object of this provision.

The object of Congress *must* have been the encouragement of that business in which the freely-admitted article was to be employed. This is true of every item of the free list. Hides come in free for the promotion of shoe-manufacture, not for the benefit of the dealer in hides, even though he may incidentally profit thereby. So, from the 'Acids,' which head the list—because of their usefulness "for chemical and manufacturing purposes"—down to "Zaffer," which closes it, for the benefit of the Trenton and other potteries and glass-works; not for the benefit of the importer of the free articles.

The context, and similar provisions, of this free list show the design to be the promotion of agriculture.

The dutying clauses (as above hinted) relate primarily to the *thing;* subjecting it to duty, *per se*, irrespective of the actual use to which any particular importation is to be put;—while the exempting clauses necessarily deal with the thing only with regard to its relation to some person or body-politic or corporate; or in view of its adaptation to the promotion of some special object, industry, or art.

Hence, the designation or description is to be most considered in the first connection; the personal or utilizing circumstances attending the importation, and the object which will be subserved by it, in the second.

For this reason, exempting clauses are often couched

in general terms, extending the privilege to many articles that are explicitly subjected to duty, when imported by other than the privileged party, or under other than the prescribed circumstances.

Where the person or the purpose is the chief subject of legislation, broad language covers many things attendant upon the person or subservient to the purpose. *All* the household and personal effects of a returning citizen are exempt, however many items of them would be dutied if brought in for sale; *all* "acids for chemical and manufacturing purposes," etc., etc.

Therefore, as well as for the more commonly assigned reason, that a strict construction should be put upon taxing clauses and a liberal one upon those granting exemption, the general terms of the free list should be held to control the specifications for duty, where the person or circumstances of the importing affect the article imported.

Rein vs. Lane, L. R. 2 Q. B. 150–1.
Powers vs. Barney, 5 Blatc. 202.
Hartranft vs. Wiegmann, 121 U. S. 609.

"*All* substances" is as comprehensive as "articles;" or as any words that could be selected; embracing every importation, the express use of which was for manures.

"The word (articles) must be taken comprehensively, and *cannot be restricted to articles put into condition for final use*, but embraces things manufactured only in part, or not at all."

Junge vs. Hedden, 146 U. S. 239 top.

It will be found that the first use of the terms "substances expressly used for manure" was in the free list of the Act of 1857, in alphabetical order, next following "specimens of botany," etc., and not at all associated with guano and manures.

Under the Tariff Act of July 30, 1846, (9 Stat. 49,) "guano" was first mentioned *eo nomine*, and made free of duty; and again under the Act of March 2, 1861,

(12 U. S. Stat. 195, § 23.) Under the Act of March 3, 1857, (11 U. S. Stat. 194, § 3) "substances expressly used for manure" are first mentioned *eo nomine*, and such substances made free; and again under the act of March 2, 1861. (12 Stats. 196.) Under the act of July 10, 1879, (16 Stats. 262) "guano and other *animal* manures" were free. Under section 2505, U. S. Rev. St., "guano and other *animal* manures," and "substances expressly used for manure," were free. Under the act of March 3, 1883, "guano, *manures*, and all substances expressly used for manures," are free. The Tariff Act of 1883 also makes free the following articles, most of which were for the first time provided for *eo nomine* in various tariff acts passed since the passage of the Act of 1846: "Albumen in any form or condition," (Heyl, New, 496;) "blood dried," *(Id.* 501;*)* "bone-dust and bone-ash for manufacture of phosphate and fertilizers," *(Id.* 503;*)* "carbon, animal, fit for fertilizing only," *(Id.* 504;*)* "hoofs," *(Id.* 512;*)* "kiersite," *(Id.* 615;*)* "kyanite, or cyanite, or kainite," *(Id.* 616;*)* "phosphates, crude or native, for fertilizing purposes," *(Id.* 626;*)* "muriate of potash," *(Id.* 627;*)* "nitrate of soda," *(Id.* 630;*)* "brimstone, not specially enumerated or provided for in this act," *(Id.* 632.*)*"

The history of this legislation, as above given, the language employed and the context, all refute the theory that "substances expressly used for manure" means articles which, as imported, are manure; or are susceptible of no other use. The argument is precisely that of the soap-grease case, and met in the same way. The clause is; "Guano, manures, and all substances expressly used for manure." (22 Stat, 515 top.) A "substance," already a completed article, which *cannot* be used for any other purpose than to fertilize *is* a manure; one of the class of "manures," and not one of those substances used for manure. It is provided for *eo nomine*. Guano was first exempt; later, guano and *animal* manures; now,

guano and *all* manures, whether of animal, vegetable or mineral origin; and all substances expressly used *for* manure—not *as* manure. The U. S. Attorney below strenuously argued 'for' meant 'as;'—the obvious question is, why did not Congress use '*as*' then. 'For' may include 'as' (in the place of, as a substitute for, manure) but it *also* means for the making of manure. Wheat and corn are employed for making bread and for making whiskey; but, if dutied by name in one place, and covered by the phrase "all grain used expressly for making bread" in another, it would the use for which it was imported that would govern the duty, or exemption.

"Expressly" does not mean *exclusively*. It indicates a *purpose*, not a quality.

Webster, "the greatest lexicographer of the English language that has yet appeared" (2 Blatc. 180 top) thus defines it;—

"EXPRESSLY. *adv.* In an express manner; in direct terms; with distinct purpose; particularly; as, a book written expressly for the young." That is, for the *use* of the young.

The Century Dictionary gives much the same definition; "with set purpose," etc., etc.

What is it that must be done directly, particularly, with a distinct or set purpose, to exempt the article? Why, its *importation* must be with that definite, predetermined purpose:—and, as to the article to which we refer, that purpose must be manurial.

An argument which places a higher duty upon the raw materials imported to be expressly used for manure than it would on the completed manure would not seem to be one to commend itself to the consideration of Congress or the Courts.

Arnold vs. U. S. 147 U. S. 497–8.
Movius vs. Arthur, 95 *Id.* 148.

What the line of argument may be, in this Court, we are as yet left to conjecture, not having received the

Government's brief. The near approach of the 'call' of this case compels us to send this to press without having seen our adversary's brief. Should it be found that we have not fully anticipated its points, leave to file an additional brief will be asked.

We add as an appendix Judge LACOMBE's opinion in this case. That of Judge MCKENNAN, in making a like disposition of a similar suit before him, will be found with the record of that case, Cadwallader vs. Shultz, No. 202 of the present term.

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APPENDIX.

The oral remarks of Judge LACOMBE, in directing a verdict in this case, not appearing in the transcript, lest they may not in the brief of the Government, we add them, as an appendix to ours:

LACOMBE, *J.*, (orally): The more frequently we are called upon to interpret statutes, the greater likelihood there is of developing a tendency to overstrained construction. It is wholesome occasionally to turn back to first principles, and to appreciate the force of the old rule, again reaffirmed by the Supreme Court in *Lake Co. vs. Rollins*, 130 U. S. 662,—that, to get at the thought or meaning expressed in a statute, the first resort in all cases is to the natural signification of the words in the order of the grammatical arrangement in which the framers of the instrument have placed them; and that it is a perfectly safe assumption that the framers of an act meant exactly what they said. The clause here, (Section 505 in the free list,) reading, "Guano, manures, and all substances expressly used for manure," very clearly expresses, and there seems no doubt that by the use of this phrase Congress has plainly said, that all imported substances, whether specially provided for *eo nomine*, or covered by any general language descriptive of their origin or qualities, which subserve the purpose of enriching the soil, and thus increasing the crops to be raised upon it, should be free. That is the plain meaning of the paragraph as it stands. I think we should err if, from some strained and over-elaborate examination of a great many other paragraphs in the act. we should seek to spell out some understanding or conception of what we might possibly infer was the intent of Congress. We are entitled to take their intent as expressed by the plain language they have used. It is very true that the use of the word "expressly" may make this paragraph difficult of application in very many cases; in fact, in all cases, so far as the collector is concerned, but it gives us no trouble in this particular action, because there is abundant evidence here to warrant the

holding that these particular importations were expressly used for manure. They have been traced from their importers into the hands of individuals whose sole business is the preparation of "fertilizers," which word is a mere synonym for manure; and, should the jury draw from the testimony any other inference than that the articles were expressly used for manure, I should be inclined to set aside the verdict. Therefore I think it is unnecessary to send the question to them. The defendant refers to the well-settled rule of interpretation that a specific designation will prevail over a general one, but the clause which he contends to be a general one (section 505, *supra)* is in reality more specific than the paragraph under which he insists these imports should be classed (paragraph 70, "sulphate of potash,") because from the general class of articles properly classified as sulphate of potash it differentiates that smaller portion which are "expressly used for manure." I will therefore direct a verdict for the plaintiffs in the sum of $2,225.84."

Heller vs. Magone, 38 F. R. 911–2.

Office Supreme Court U. S.
FILED.
OCT 17 1893
JAMES H. McKENNEY,
CLERK.

C. G. Gurgoyne's Printing Business, 146 150 Centre St. N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 47.

DANIEL MAGONE

vs.

JAMES E. HELLER ET AL.

Defendants' Notes of Reply.

I.

That the importation was valued according to the proportion of sulphate of potash it contained (Atty.-Gen.'s Br. pp. 11-13) is of no consequence. Gold-bearing quartz is sold, for milling purposes, according to the quantity of precious metal it contains; yet it is ore and not gold. The Attorney-General states (at pp. 12 bottom and 13 top) that *the purification of the article abroad is only carried just so far as to fit it for exportation in a condition to be used for fertilizing purposes* only.

That the farmers mix it with their animal manures (*Id.* p. 13 top) does not make it any less a 'substance used for manure' than if used unmixed; otherwise the

animal excretion which enters into the composition would not be such substance before the compounding!

It could make no difference whether the importation was known as 'sulphate of potash' or not; since it was also known to be that article only so far purified as to fit it for manure, and it was expressly imported for that use.

II.

It is immaterial if 'expressly' may bear three interpretations (Atty.-G.'s Br. p. 16, II) since *our importation*, unquestionably, *responds to all three!*

It *could* be used for manure; it *was imported* 'expressly' for such use; and it *was* actually so used.

To suppose that the collector must first collect the duty is a mistake. If so, he must do it on a returning citizen's new wearing-apparel, until it is established that he *has* worn it. (111 U. S. 202.) Or, more pertinent, he must see that cattle are put to breeding, before he refunds the duty exacted upon landing; and the department held he must also find them *fit* to improve our home breed. (Moreill vs. Jones, 106 U. S. 466.) A bull may be used for draught or as a breeder. It is the use for which he is imported that exempts him from or makes him liable to duty.

This upsets the departmental 'possibility of use' theory; that the intended use must be the only possible use. A new overcoat brought in to wear, may *possibly* be sold.

We repeat that a thing which, in the very shape in which it is unladen, cannot possibly be put to any use but that of a fertilizer *is* a 'manure,' and comes in under that word; the other words mean to include something more.

It is departmental *methods of doing clerical business* that the courts have considered : never, as authoritative, its exactions of duty. It is *because* the department ruled as it did that we are here. An appeal to the Courts from the Secretary's decision would be futile if the judiciary were in the least bound by the decision (or one as to like importations) from which the appeal is taken.

Justice BLATCHFORD'S vast experience in customs cases led him to conclude that departmental decisions, like Swiss mercenaries, could be found fighting on every side of every question.

For example, see this very matter. According to the Attorney-General's brief (p. 7) Nov. 20, 1869, the Secretary wrote the Collector that the article there mentioned could only be admitted to free entry if *susceptible* of no other use than as manure. Upon the fourth of the next month, and again Jan. 28, 1870, he says that same article may be let in free if, containing not over 50% potash, it cannot "PROFITABLY" be used for aught but manure; and Aug. 5, 1870, he arbitrarily reduces the standard to 30 per cent.

Is it not established, too, that our importation could only 'profitably, be employed for manure?

III.

Many of the general phrases of the free list show that the doctrine of specific enumeration in the dutying clauses have no application to exemptions.

Our opponent notices the distinction (at p. 25 of his brief) and then argues that the *intention* of the lawgiver must prevail. Certainly: but that does not advance us a single step; for our inquiry still is, what did Congress intend. There is no more reason to suppose